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> For so runs the oracle of our inspired teacher: "When you come to a patient's house, you should ask him what sort of pains he has, what caused them, how many days he has been ill, whether the bowels are working and what sort of food he eats." So says Hippocrates in his work Affections. I may venture to add one more question: What occupation does he follow?[1]

Since early this century, workers suffering injury by accident in the workplace have been able to secure relief from their state workers' compensation systems without regard to the fault of either employer or employee.[2] Later, states began to provide coverage for occupational diseases arising out of and in the course of a worker's employment. Eventually, all states amended their workers' compensation acts, or enacted new statutes, to include coverage for work-related health impair-

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1. B. RAMAZZINI, DISEASES OF WORKERS 13 (W. Wright trans. 1964) (original Latin text, DE MORIBUS ARTIFICUM, published in 1713).

2. The first workers' compensation law enacted in the United States was a narrow and short-lived statute passed by Maryland in 1902 to compensate miners injured by accidents. It, as well as the next few statutes passed by other states, was soon declared unconstitutional.

In 1908, Congress enacted coverage for certain federal employees. Several states followed with legislation designed to avoid the early constitutional problems. In 1917, the Supreme Court upheld different forms of workers' compensation legislation. *See* New York Cent. R.R. v. White, 243 U.S. 188, 208 (1917); Hawkins v. Bleakly, 243 U.S. 210, 213-14 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219, 225-26 (1917). Declaration of the constitutionality of these acts led to enactment of similar schemes in other states. By 1920 all but eight states had enacted such legislation. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 5.20, .30 (1964 & Supp. 1984).

While at times fault plays a role in denying a worker compensation under judicial and statutory exceptions for injuries caused by willful or intentional acts such as horseplay, *e.g.*, IND. CODE ANN. § 22-3-2-8 (Burns 1974 & Supp. 1984), or assault, *e.g.*, Armstead v. Sommer, 126 Ind. App. 273, 280-81, 131 N.E.2d 340, 344 (1956), as a general rule fault is irrelevant to the issue of whether a worker is to be compensated for his or her injury. 1 A. LARSON, *supra*, § 1.20; NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 21-26 (1973). With respect to the employer's intentional tortious conduct, there has been even less of a tendency to find additional fault-based liability either within or outside the workers' compensation system. *See infra* note 496.

ments that generally are caused not by specific and sudden traumatic events, but rather are the result, at least in part, of exposure to toxic substances found in the place of employment.[3]

From the outset, it was recognized that occupational diseases, particularly those caused by substances specific to the workplace, were often slow to develop.[4] During these extended gestation periods, other causative elements often played a role, sometimes the dominant role, in producing the deteriorations of health ultimately leading to the worker's disablement or death.[5] Nevertheless, these work related diseases were a

3. Massachusetts was the first state to grant occupational disease coverage, which was accomplished through judicial interpretation. P. BARTH & H. HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES 2 (1980).

In addition to the legislation of the 50 states, *see* Summary Chart in the Appendix, federal legislation has extended coverage to American Samoa, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, as well as to federal workers, Federal Workmen's Compensation Act, 5 U.S.C. § 8101 (1982), longshoremen, Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982), and coal miners, Black Lung Benefits Act, 30 U.S.C. § 901 (1982).

As late as the early 1970's, nine states (Arizona, Colorado, Iowa, Kansas, Louisiana, New Mexico, Oklahoma, Vermont, and Wyoming) provided coverage for specified diseases only. Larson, *Occupational Diseases Under Workmen's Compensation Laws*, 9 U. RICH. L. REV. 87, 88-89 (1974); Note, *Compensation and the Asbestos Industry*, 33 SYRACUSE L. REV. 1073, 1079 n.46 (1982) [hereinafter cited as Note, *Compensation*]. Currently, all states provide for universal coverage of occupational diseases, *see* UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS 10-15, chart IV (1984), though a number of state statutes retain their earlier lists of enumerated diseases along with a catchall provision. *See, e.g., infra* notes 158-61 & accompanying text.

4. The connection between extensive workplace exposure and certain diseases has been known for a surprisingly long period of time. Byssinosis, for example, was known to afflict textile mill workers in the early 1800's. P. BARTH & H. HUNT, *supra* note 3, at 8. See generally *id.* at Table 1.1 for a timetable of the discovery of occupational cancers. While Pliny (A.D. 50) mentions that weavers producing wicks for the vestal virgins' lamps wore masks to avoid inhaling asbestos dust, Note, *Issues in Asbestos Litigations*, 34 HASTINGS L.J. 871, 872 n.7 (1983) (citing J. CROFTON & A. DOUGLAS, RESPIRATORY DISEASE 589 (3d ed. 1981)) [hereinafter cited as Note, *Issues*], general awareness of the dangers of asbestos did not occur until this century. The British were conducting studies on asbestos dust inhalation by 1924, and regulated its distribution and use soon thereafter. Note, *Compensation*, *supra* note 3, at 1077.

P. BARTH & H. HUNT, *supra* note 3, at 5, cite the slow development of many of the "classical" occupational diseases, such as lead or mercury poisoning, as one of the reasons why there has been general public apathy about occupational disease. By the time the disease develops, its occupational nature may not be clear; rather, it may be perceived as part of the aging process.

5. For example, there is substantial evidence that smoking greatly increases the risk of developing asbestosis. Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 923-24 n.59 (1980) [hereinafter cited as Note, *Compensating Victims*]; *cf.* Olson v. Federal Am. Partners, 567 P.2d 710, 712-13 (Wyo. 1977) (no compensation for lung cancer to uranium mine worker who also smoked). In addition, a worker's exposure to asbestos outside the workplace may contribute to asbestosis. An estimated 3000 commonly used products con-

reality of industrial employment; legislators realized that compensation for their effects had to be subsumed into the statutory schemes. To lessen the uncertainty from multiple causation, however, the various statutes included limitation provisions generally tied to the date of the employee's last exposure to the injurious hazard[6] and to the date upon which the worker finally became disabled and unable to work.[7] State legislatures enacted these limitation statutes to deter spurious and doubtful claims, trusting that the great majority of meritorious claimants would obtain relief. The early statutes attempted to strike this balance by establishing an optimum period for filing claims on the assumption that within the period following a final exposure to the toxic hazard the affected workers would exhibit clear symptoms, become disabled, and be able to file their claims.[8]

Not surprisingly, the pattern of occupational disease onset often failed to follow the legislators' expectations. Certain substances manifested their toxic effects more slowly than was anticipated, while worker sensitivity to many of these materials proved more variable than was first

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tain asbestos. Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860, 861 (1980).

Workers exposed to carbon tetrachloride are much more likely to die if they have also consumed alcohol. Risk of liver and kidney damage from exposure to trichlorothylene is also substantially increased by alcohol consumption. P. BARTH & H. HUNT, *supra* note 3, at 12.

A major current problem with respect to causation is the relationship between workplace stress and emotional or physical illness. *See* NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY, FINAL EDITED PROCEEDINGS 309, 311 (1981) (remarks of Ronald E. Gots, M.D.) [hereinafter cited as NATIONAL CONFERENCE PROCEEDINGS].

6. *See infra* notes 100-224 & accompanying text.

7. Disablement is generally a predicate for filing a claim under workers' compensation statutes. In the case of a slow-developing disease, this requirement can produce harsh results when combined with a last exposure rule. *See infra* note 526 & accompanying text; *see also* Bunker v. National Gypsum Co., 441 N.E.2d 8, 18 (Ind. 1982) (Hunter, J., dissenting) (arguing that claimant should be barred because he was not yet disabled even though he was experiencing asbestosis symptoms).

Another limitation designed to ensure that the disease is occupationally caused is a minimum exposure requirement. These statutes generally require exposure to the hazardous substance in the workplace for five to 10 years. *See infra* notes 225-41, 374-79 & accompanying text.

Many states also require plaintiffs to prove, in contested cases, that their diseases were occupationally related, and in some states that they were not "ordinary diseases of life." *See, e.g.*, GA. CODE ANN. § 114-803 (1983); OR. REV. STAT. § 656.802(a) (1983).

8. Most states initially used the same time period for occupational diseases as for accidental injury. Generally, this statutory time period began to run at the time of injury or accident. P. BARTH & H. HUNT, *supra* note 3, at 120. As the etiology of occupational diseases became known, many states adjusted the period allowed for occupational diseases.

assumed.[9] In addition, the lengths and intensities of exposure from case to case varied more than had been expected.[10] A common legislative response to this problem was to carve out statutory exceptions granting victims of exposure to specific workplace substances, such as asbestos dust and silica dust, extended periods in which to bring their claims.[11] Increased relief for victims also came from judicial interpretation of the key operative terms of the limitation statutes, such as "time of injury,"[12] "time of disablement,"[13] and "time of contraction."[14]

Ultimately, in a number of jurisdictions legislatures enacted, and courts construed, "discovery" rules to govern these cases.[15] Under such provisions, the limitation periods begin when claimants discover, or through due diligence should discover, the nature of the occupational diseases that have disabled them. Although discovery rules may provide the maximum justice to the individual claimant, they also create the actuarial uncertainty that is anathema to workers' compensation insurance underwriters.[16] In addition, if fewer claims are barred through the operation of statutes of limitation, the compensation insurance premiums of a state's employers are likely to rise. This factor of workers' compensation rates looms ever more important in the states' increasingly competitive

9. Asbestosis, for example, generally manifests itself 10 to 40 years after significant exposure. I. SELIKOFF & D. LEE, ASBESTOS AND DISEASE 42-56 (1978).

Moreover, the toxicity of the materials can vary. There are 30 different minerals in the asbestos family, six of which are in common use. Chrysotile, the most widely used asbestos fiber, is the least dangerous. It is used in asbestos textiles, cement products, friction materials, insulation, and paper products. Crocidolite, used in pipes, textiles, felts for plastics and cement products, is the most dangerous. Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 579 n.1 (1983).

10. While exposure often continues for years, disease can develop from very limited exposure. In fact, spouses and children of asbestos workers run an increased risk of developing the disease from coming in contact with the clothes and person of asbestos workers. G. PETERS & B. PETERS, SOURCEBOOK ON ASBESTOS DISEASES B7, C5 (1980); N.Y. Times, Oct. 5, 1981, at D11, col. 6 (citing a study released by the American Lung Association).

11. *See* P. BARTH & H. HUNT, *supra* note 3, at 6; Summary Chart in the Appendix.

Another kind of response, generated by fears that the compensation system would be overwhelmed, was to carve out exceptions for diseases such as silicosis when their pervasiveness became known and to limit compensation for them. New York, for example, changed its law giving comprehensive coverage for all occupational diseases so that coverage of partial disability resulting from silicosis or other dust diseases was eliminated, and benefits for death or total disability were limited. P. BARTH & H. HUNT, *supra* note 3, at 3; *see also* Kutchins, *The Most Exclusive Remedy Is No Remedy at All: Workers' Compensation Coverage for Occupational Disease*, 32 LAB. L.J. 212, 219 (1981).

12. *See infra* notes 293-301 & accompanying text.

13. *See infra* notes 293-301 & accompanying text.

14. *See infra* notes 311-16, 335-40 & accompanying text.

15. *See infra* notes 293-379 & accompanying text.

16. P. BARTH & H. HUNT, *supra* note 3, at 124.

"chase for smokestacks" as the types of recognized compensable claims, as well as their frequency, increase dramatically year after year.[17]

If, however, both a state's legislature and its courts decline to provide a discovery rule for occupational disease, a claimant who is barred by a limitation period can still attack the limitation statute itself on constitutional grounds. A limitation that is too short to provide the remedy promised may deny due process of law to the injured party.[18] A limitation statute that classifies claimants arbitrarily and invidiously arguably denies equal protection of the laws.[19] Additional alleged constitutional infirmities have also been found in provisions specific to certain state constitutions.[20]

This Article reviews the various limitation statutes that currently govern state occupational disease acts. Because of the great variety of these provisions, we focus the discussion on the degree of success that a prototypical claimant might attain under them. The prototype is based on a fact situation which recently triggered the operation of a limitation statute in the state of Indiana. In *Bunker v. National Gypsum Co.*,[21] the claimant was exposed to asbestos dust for a twenty-two month period during the late 1950's. He then left the asbestos-laden environment and in the late 1970's began to experience respiratory difficulty, which was unequivocally diagnosed as asbestosis. The Indiana Industrial Board denied Bunker's claim for compensation benefits under the Indiana Occupational Diseases Act.[22] On appeal, the claimant mounted one of the

17. In the Alexander Grant & Co. rating of manufacturing climates in the 48 contiguous states, workers' compensation insurance rates are a key factor in determining rankings. Grant surveys manufacturer trade associations in the states to determine the relative importance to the associations of 22 factors. These factors are then ordered and weighted and used to determine a state's manufacturing climate. In the 1983 report, workers' compensation rates ranked fifth in importance (behind energy costs, level of unionization, taxes, and wage rates). Indianapolis Star, May 22, 1984, at 9B, col. 1; *see also Michigan Firm is Moving to Muncie*, Indianapolis News, Feb. 26, 1982, at 26, col.5 (reporting that lower workers' compensation premiums may induce a Michigan-based company to relocate seven factories in Indiana).

18. *See, e.g.*, Lankford v. Sullivan, Long & Hagarty, 416 So. 2d 996, 1004 (Ala. 1982); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 527, 464 A.2d 288, 296-97 (1983); *see also infra* notes 72-79, 434-42 & accompanying text.

19. *See, e.g.*, Heath v. Sears, Roebuck & Co., 123 N.H. 512, 526, 464 A.2d 288, 296 (1983); Carson v. Maurer, 120 N.H. 925, 932-33, 424 A.2d 825, 831 (1980); *see also infra* notes 58-71, 405-59 & accompanying text.

20. *See, e.g.*, Battila v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980); Kennedy v Cumberland Eng'g Co., 471 A.2d 195, 198-99 (R.I. 1984).

21. 441 N.E.2d 8 (Ind. 1982), *rev'g* 426 N.E.2d 422 (Ind. App. 1981), *appeal dismissed*, 103 S. Ct. 1761 (1983). Bunker also brought an action for common-law negligence. 406 N.E.2d 1239 (Ind. App. 1980).

22. IND. CODE ANN. § 22-3-22 (Burns 1974 & Supp. 1984); Bunker v. National Gypsum Co., 426 N.E.2d 422, 422 (Ind. App. 1981).

most comprehensive challenges to such a statute seen to date. Eventually, Bunker's claim was denied by the Indiana Supreme Court and the United States Supreme Court.[23]

The *Bunker* case was significant for several reasons. First, Bunker's argument included a strong constitutional attack on the Indiana statute. Second, the Indiana court had to decide which law determined the limitation period for filing a claim: the law at time of exposure, the law in force when symptoms emerged, or the law in effect at yet some other trigger date.[24] Between Richard Bunker's period of exposure to asbestos and the first manifestation of his asbestosis symptoms, the Indiana General Assembly amended its workers' compensation statute so that Bunker and his employer were thereafter covered by the system. Prior to 1963, noncovered employees' remedies against their employers had to be found in common-law tort;[25] after 1963, injured employees were bound by the sole remedy provision of the Indiana workers' compensation statute.[26] Variations of this controlling law problem have significantly affected occupational disease claims under a number of state statutes.[27] Finally, the decision in *Bunker* is significant because claimants such as Richard Bunker constitute a substantial class of potential victims of delayed manifestation occupational diseases.[28] The arguments raised by Bunker are sure to arise in states whose limitation statutes operate similarly to Indiana's.

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23. His constitutional argument prevailed in the Indiana Court of Appeals. *See* 426 N.E.2d at 425. The decision was reversed by the Indiana Supreme Court, and his direct appeal to the United States Supreme Court was dismissed for want of a substantial federal question. 103 S. Ct. 1761 (1983).

24. 406 N.E.2d at 1240.

25. The 1950 act was applicable "only to those who had affirmatively accepted it." 406 N.E.2d at 1240. The court found that there was no evidence that defendant National Gypsum had accepted the act. *Id.*

26. Current version codified at IND. CODE ANN. §§ 22-3-7-1 to -38 (Burns 1974 & Supp. 1984).

27. *See infra* notes 380-404 & accompanying text.

28. Delayed manifestation injuries from asbestos are expected to number several million. Estimates vary from eight million, National Cancer Institute and National Institute of Environmental Health Sciences, Estimates of the Fraction of Cancer Incidence in the United States Attributable to Occupational Factors 1-2 (draft summary Sept. 11, 1978), to around 20 million. The number of persons developing asbestos-related diseases each year is not expected to level off until the 1990's. Special Project, *supra* note 9, at 580.

A twelve-year study by Dr. Irving Selikoff of the Environmental Sciences Laboratory of the Mount Sinai School of Medicine, of 20,000 workers of the International Association of Heat and Frost Insulators and Asbestos Workers, found that the death rates among these workers was 37% higher than normal rates among blue-collar workers of similar ages and lifestyles. The study estimated that 18.8 million workers had "significant" exposure to asbestos since 1940 and that 201,000 of the 14.1 million who were still living would die from asbestos-related cancers by the end of the century. Seven million living workers had less exposure,

Part I of the analysis presents the *Bunker* case in detail. In part II

but were at some risk. Many of those who did not die would be disabled. Lauter, *Who Pays Asbestos Victims?*, Nat'l L.J., July 26, 1982, at 14, col. 2.

Thirty-six percent of the insulation workers who died of asbestos-related cancer applied for benefits; only 38% received any award. *Id.* In another study, 23% of widows claiming benefits for workers who died from asbestos-related diseases did not receive benefits. This number is significant because the median survival time for mesothelioma victims is 4-12 months from diagnosis. Thus the victim himself often has little chance to collect. Note, *Issues*, *supra* note 4, at 877 n.42. Only 700 workers had received compensation for asbestos-related diseases by 1980. Reutter, *Workmen's Compensation Doesn't Work or Compensate*, 35 BUS. & SOC'Y REV. 39, 42 (1980).

The recovery figures are not much better for occupational diseases generally. The prior study found that only 5% of occupational disease victims received compensation. *Id.* at 39. Since there are as many as 100,000 occupational disease deaths and 390,000 new cases of occupational disease per year in the United States, thousands are going without compensation. PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH 111 (1972). These figures may be conservative. Note, *Compensating Victims*, *supra* note 5, at 916 n.2. One study suggests there are at least 70,000 deaths a year from occupational cancers; another that 150,000 deaths a year occur from occupational respiratory diseases. *Id.* Such diseases are generally slow to develop. For a comprehensive list of occupational disease by occupation, see P. BARTH & H. HUNT, *supra* note 3, at Appendix C.

Of course, there are many reasons why recovery for occupational disease is not higher. *See, e.g.*, P. Barth & H. Hunt, *supra* note 3, at 61-134; Note, *Compensating Victims*, *supra* note 5; Special Project, *supra* note 9, at 731-56. One study, for example, found that a majority of survivors of asbestos workers "had no idea of their legal right to workers' compensation." NATIONAL CONFERENCE PROCEEDINGS, *supra* note 5, at 295, 298 (remarks of Peter Barth). The limitations discussed in this paper, however, play a major role.

Some other workplace substances which are having an increasing impact due to delayed manifestation of injuries are formaldehyde, polyvinylchoride (PVC), radiation, and microwaves. The impact of injuries from these substances on the compensation systems could be as great or greater than that from asbestos. Suits arising from exposure to microwaves, which has occurred almost exclusively in the workplace, have been predicted to become the broadest-based product liability litigation ever. Nat'l L.J., Sept. 14, 1981, at 24, col. 1. Formaldehyde, which has been described as ubiquitous, Nat'l L.J., May 10, 1983, at 1, col. 1, is used in a wide variety of ways in the workplace. Use has been especially heavy in the forest-products industry, which uses one-half of the formaldehyde produced, and the textile industry, which uses one-quarter. In all, about 1.4 million people come into contact with formaldehyde solutions in the workplace. Wall St. J., May 21, 1982, at 23, col. 1. The U.A.W., which along with 14 other unions sued OSHA to set stricter exposure standards in factories, claims that as many as one percent of workers exposed at current levels may die of formaldehyde-related cancers. Wall St. J., Mar. 15, 1983, at 1, col. 5. The AFL-CIO cited formaldehyde as a health hazard to workers in beauty salons and barber shops where it is used in sterilizing solutions and in some beauty products. Wall St. J., Feb. 8, 1983, at 1, col. 5.

Almost monthly, new workplace carcinogens and suspected carcinogens are being identified. These include newspaper ink, *see, e.g.*, Hanna v. Sun Chem. Corp., No. C-81-1967 (N.D. Ohio 1981); Grady v. Sun Chem. Corp., No. C-81-1696 (N.D. Ohio 1981), asphalt fumes, Wall St. J., Apr. 27, 1983, at 1, col. 5, and fluorescent lights, Wall St. J., Apr. 12, 1983, at 26, col. 4. Recently it was disclosed that wood-model makers in the auto industry are 50% more likely to develop cancer, although the specific carcinogen has not been identified. Simison, *Cancer Peril Disturbs Wood-Model Makers in the Auto Industry*, Wall St. J., Jan. 3, 1983, at 1, col. 6. Even VDTs (video display terminals) have become suspect, and at least nine states are considering legislation to regulate their use. Wall St. J., Mar. 6, 1984, at 1, col. 5.

the Article reviews the various state workers' compensation statutes of limitation together with other limitation provisions, such as minimum exposure rules and presumptions, that can operate to abrogate occupational disease claims. Because it is often difficult to determine from the face of many of these provisions how they operate in a specific situation, the Article analyzes the major court decisions interpreting the statutes. Each statute is subjected to the same final inquiry: would a claimant like the one in *Bunker v. National Gypsum Co.* have recovered compensation benefits in the jurisdiction? By using this method the various limitation provisions are classified according to practical operational criteria.

The final part of this Article considers several public policy problems inherent in these limitation schemes, as well as the constitutional constraints operating on them. A critical concern is the controlling law problem mentioned above. Many workers who were originally exposed to slow acting toxic substances while restrictive limitation provisions were in force now find that these statutes have been amended and "liberalized" prior to the time of the workers' disablement and thus may no longer bar the recovery of benefits. The result could be that employer liability, once believed to be in repose, may be reactivated depending on judicial interpretation and doctrinal analysis. The final section also compares judicial review of tort limitation and repose statutes with that applied to the limitation provisions under workers' compensation and occupational disease statutes. We then comment on the need for greater national uniformity of workers' compensation law and the importance of coordinating the workers' compensation system more closely with the tort system, with regulatory schemes governing the workplace, and with other social compensation mechanisms. We end with a number of conclusions and recommendations for legislators of occupational disease acts.

Bunker v. National Gypsum Company

Richard Bunker worked in Indiana for the National Gypsum Company from February 1949 to March 1966.[29] For the first twenty-two months of his employment he supervised a blending process for the manufacture of an acoustical treatment product. During this assignment he was exposed to asbestos fibers, but then was transferred to other work that was asbestos free.[30] Shortly after leaving National Gypsum, Bunker secured employment in Iowa as a technical salesman, a job involving no

29. 441 N.E.2d at 9-10.
30. *Id.* at 10.

contact with asbestos.[31] In July 1976, Bunker entered the hospital for exploratory surgery to determine the cause of some difficulty he was encountering with his breathing.[32] His condition was diagnosed as asbestosis. Bunker filed a claim for workers' compensation benefits under the Indiana Occupational Diseases Act,[33] seeking recovery for his medical expenses as well as lost wages for the approximately four-week period during which he had suffered temporary total disability.[34] He also brought a companion action for negligence against National Gypsum.[35]

Common-Law Negligence—Which Law Controls?

Bunker's civil action alleging "gross negligence in the failure to provide safe working conditions"[36] was dismissed for failure to state a claim for which relief could be granted.[37] The Indiana Court of Appeals affirmed, holding that Bunker's sole remedy under Indiana law lay in the Indiana Occupational Diseases Act.[38]

The issue before the Indiana Court of Appeals was whether the law at time of exposure or the law in operation after 1963 controlled Bunker's claim. Bunker had argued that his entire exposure to asbestos had occurred prior to 1963, the year that the statute was amended to make coverage mandatory unless the employee "exempted himself from the provisions of the act."[39] Thus, during the entire period he was exposed to the hazards of asbestosis, neither he nor his employer was covered by the Act. The gist of his argument was that, without such coverage, the employee should be free to bring a common-law action.[40]

The court ruled that, because a claim for benefits under the Act can be maintained only after the claimant becomes disabled, the law at the time of disablement must govern the claim.[41] Because Bunker was first

31. *Id.* at 16 (Hunter, J., dissenting).

32. *Id.* at 10; *see also* Record of the Proceedings at 47, Bunker v. National Gypsum Co., 426 N.E.2d 1239 (Ind. App. 1980), *rev'd*, 441 N.E.2d 8 (Ind. 1982) (transcript of the evidence) [hereinafter cited as Record].

33. Current version codified at IND. CODE ANN. §§ 22-3-7-1 to -38 (Burns 1974 & Supp. 1984).

34. *See* Record, *supra* note 32, at 5 (Indus. Bd. of Ind., Form 9, claim for compensation "for total disability during exploratory surgery and post operative recovery").

35. 406 N.E.2d 1239 (Ind. Ct. App. 1980).

36. *Id.* at 1240.

37. *Id.* at 1242.

38. *Id.* at 1241.

39. *Id.* at 1240.

40. *Id.* at 1240-41.

41. *Id.* at 1241 (citing Hibler v. Globe Am. Corp., 128 Ind. App. 156, 147 N.E.2d 19 (1958)).

One can argue that the court's decision equated "disablement" with "injury" which may

disabled in 1976,[42] the law in effect at that time was held to control. Effective in 1963, the law provided that the Indiana Occupational Disease Act was the exclusive remedy available to an occupational disease victim.[43] But had Bunker become disabled prior to 1963, presumably he could have maintained his common-law action for negligence.

Even if the court had recognized Bunker's right to bring a common-law action against his employer, he would have run afoul of the Indiana general tort statute of limitations for personal injury. Under that statute a plaintiff has two years to file a claim after his cause of action accrues.[44]

In states that follow a discovery rule in tort actions, the issue of which law—tort or workers' compensation—governs a delayed manifestation case can be crucial in determining whether tort benefits, or any benefits at all, will be available to a victim of an occupational disease.

The Occupational Diseases Act Claim

Bunker was also unsuccessful in his workers' compensation claim under the Indiana Occupational Diseases Act.[45] The Indiana Industrial

be a valid assumption under an occupational disease act, but is not necessarily so under common-law tort. An employee can suffer a health impairment without becoming disabled according to the meaning of the disease statute, yet still be able to prove tort damages. The answer to this argument, of course, is that once Bunker accepted the coverage of the Indiana Occupational Diseases Act by not expressly exempting himself, he accepted all its terms which included surrender of all unfiled employment-related personal injury tort claims against his employer, including those that were inchoate in 1963.

42. The term "disablement" is defined in the Act as follows:

> The term 'disablement' means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation or equal wages in other suitable employment and 'disability' means the state of being so incapacitated.

Id. at 1241 (quoting Hirst v. Chevrolet, 110 Ind. App. 22, 27, 33 N.E.2d 773, 775 (1941) (quoting Indiana definition of "disablement" and "disability", currently codified at IND. CODE ANN. § 22-3-7-9(e) (Burns Supp. 1984)).

In this Article the terms "disablement" and "disability" are used interchangeably.

43. 406 N.E.2d at 1240-41.

44. IND. CODE ANN. § 34-1-2-2 (Burns 1974 & Supp. 1984). When Bunker brought his action, there was some doubt as to when negligence claims accrue in Indiana: when the harm is ascertainable (discovery rule), or when the plaintiff's rights are invaded, even if the plaintiff has no way of discovering the invasion. *See* Leibman, *Workmen's Compensation, 1981 Survey of Recent Developments in Indiana Law,* 15 IND. L. REV. 453, 467 & n.116 (1982). The issue appears to have been settled by Shideler v. Dwyer, 417 N.E.2d 281, 289-90 (Ind. 1981), in which the Indiana Supreme Court relied on a leading New York "dust" case, Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936), for the proposition that a cause of action accrues, absent fraudulent concealment, when the defendant sets in motion the force that ultimately results in harm to the plaintiff.

45. Current version codified at IND. CODE ANN. §§ 22-3-7-1 to -38 (Burns 1974 & Supp. 1984).

Board ruled that the statute of limitations had run out three years after Bunker was last exposed to the injurious hazards of asbestos dust, thus barring him from recovering compensation.[46]

Bunker presented several arguments challenging the validity of the limitation provision.[47] First, he contended that his exposure to the hazards of asbestos had not ended in 1960 when he transferred from the hazardous job environment; rather, the exposure was continuous because the harmful asbestos fibers had been irreversibly incorporated into the tissues of his respiratory system, where they continued to expose his body to harm.[48] Second, Bunker argued that the Indiana statute created classifications of claimants which are arbitrary, invidious, and discriminatory, and, as a result, certain classes of employees received privileges and immunities while others were denied equal protection of the laws.[49] Finally, Bunker claimed that a statute of limitations which runs before the victims of slowly developing diseases exhibit the symptoms and have a right to file their claims denies due process of the law.[50]

Continuing Exposure

Medical evidence supported Bunker's assertion that his fibrotic lung condition, known as asbestosis, resulted because, once inhaled, the asbestos dust fibers were neither absorbed nor excreted from his body.[51] After they are in place, the fibers expose the pulmonary and digestive tissues to continuing irritation, finally leading to seriously impaired breathing.[52] The fibers remain *in situ* increasing the damage they do with

46. 441 N.E.2d 8, 9 (Ind. 1982). The statute invoked by the Board reads as follows:

> No compensation shall be payable for or on account of any occupational diseases unless disablement, as defined in subsection (e) of this section, occurs within two [2] years after the last day of the last exposure to the hazards of the disease except in cases of occupational diseases caused by the inhalation of silica dust, coal dust, or asbestos dust and in such cases, within three [3] years after the last day of the last exposure to the hazards of such disease. However, in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as defined in subsection (e) of this section, occurs within two [2] years from the date on which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

IND. CODE ANN. § 22-3-7-9(f) (Burns Supp. 1984).

47. *See* Brief for Appellant, Bunker v. National Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1981) [hereinafter cited as Appellant's Court of Appeals Brief].

48. *See infra* notes 51-57 & accompanying text.

49. *See infra* notes 58-71 & accompanying text. This argument was raised substantially for the first time on appeal.

50. *See infra* notes 72-79 & accompanying text.

51. Appellant's Court of Appeals Brief, *supra* note 47, at 7.

52. 426 N.E.2d at 424-25 (discussing the work of Dr. Irving Selikoff and others).

the passage of time. Because the Indiana statute referred only to the "last day of the last exposure to the hazards of such disease,"[53] Bunker argued that the "last day" had not yet arrived because his body was continuously exposed to the irritating asbestos fibers lodged irretrievably in his lungs.[54]

The Indiana Industrial Board was sympathetic to Bunker's medical analysis, but not to his statutory interpretation: "While Plaintiff's exposure may be a continuing one, that is, continuing as a result of the permanent deposit of asbestos fibers within his body, the Legislature cannot be said to have intended the term 'last exposure' to mean other than 'last exposure' during and 'in the course' of employment."[55] Bunker's construction of the Indiana statute could not be sustained because to do so would be to remove all temporal limitations from the statutory scheme for asbestosis and a host of similar conditions. Although a three-year last exposure rule may be overly harsh, virtually every state provides some time limit in which a claimant must file or at least give notice of injury to the employer.[56] The essential differences between the state statutes are the points in time at which the various limitation periods begin and the length of time those periods run.[57]

Equal Protection

Bunker identified two classification schemes by which the Indiana statute of limitations conferred disproportionate benefits to occupational disease victims without any rational basis.[58] First, the statute distinguished between radiation claimants and dust disease claimants.[59] Both sets of victims suffer delayed manifestation disease, yet radiation victims can bring their claims after discovering the nature of their illness, while dust disease victims are subject to a complete bar three years after their last exposure to the hazard. Moreover, the bar can operate before their disease symptoms become manifest and before knowledge of the causal relationship between the symptoms and the employment is discoverable

53. *See* IND. CODE ANN. § 22-3-7-9(f) (Burns Supp. 1984).

54. Appellant's Court of Appeals Brief, *supra* note 47, at 7.

55. *Id.* at 3 (quoting Award from Indus. Bd. of Ind., Dec. 26, 1979). Many states following a last exposure rule have avoided this problem by qualifying the expression "last exposure" with a phrase such as "within the employment." *E.g.*, Alabama. *See infra* notes 87-89 & accompanying text.

56. Even states with discovery rules require the claimant to file a claim or give notice to the employer within a fixed time from the discovery of disease and disability and/or knowledge of the occupational relationship of the disease. *See infra* notes 293-345 & accompanying text.

57. *See infra* notes 80-379 & accompanying text.

58. *Id.* at 21-22.

59. *See supra* note 46 & accompanying text.

by the claimant.[60]

The second invidious class noted by Bunker was based on a distinction between employees whose contact with asbestos terminated less than three years prior to their ultimate disablement and those whose exposure to the hazard terminated more than three years prior to disablement. Bunker argued that like the first class, members of the second class were subject to contracting asbestosis given the cumulative effect of continuous *in situ* irritation by the inhaled fibers over a long gestation period.[61]

The employer argued that Bunker had failed to prove that there was no essential distinction between radiation and dust disease claimants; therefore, disparate treatment was not irrational.[62] Although the Indiana legislature had several opportunities to provide identical treatment to the two classes, it had not done so, indicating that it saw enough difference between radiation sickness and dust disease to grant a discovery rule to victims of the former type but not to the latter.[63] Respondent also argued that dust victims whose contact with the hazards were terminated more than three years prior to disablement were not unfairly discriminated against because all dust disease victims were subject to the three year from last exposure rule.[64]

The Industrial Board saw no merit in Bunker's equal protection argument and ruled for National Gypsum.[65] The Indiana Court of Appeals reversed,[66] primarily on due process grounds,[67] but commented that it saw no rational basis "to divide exposed workers for purposes of coverage into those continually exposed for the necessary 20 to 30 year gestation period and those not."[68]

The Indiana Supreme Court vacated the decision of the court of appeals.[69] In essence, the supreme court deferred to the judgment of the legislature.[70] The majority opinion addressed the due process arguments found persuasive by the court of appeals, but concluded that a statute of limitations affords due process so long as it provides a reasonable time for bringing an action, and a determination of its length is the legislature's

60. Appellant's Court of Appeals Brief, *supra* note 47, at 22-24.
61. *Id.* at 24-25.
62. *Id.* at 30-31.
63. *Id.* at 30.
64. *Id.* at 31.
65. *Id.* at 3 (quoting Award from Indus. Bd. of Ind., Dec. 26, 1979).
66. 426 N.E.2d at 425.
67. *See infra* notes 72-75 & accompanying text.
68. 426 N.E.2d at 425 n.7.
69. 441 N.E.2d at 9.
70. *Id.* at 12.

prerogative, unless the period is so manifestly insufficient that it represents a denial of justice.[71]

Due Process

Bunker's due process argument was grounded on certain medical peculiarities associated with asbestosis and similar diseases. Asbestosis develops slowly and during much of that development is often undetectable.[72] Workers exposed to the asbestos dust may show no symptoms, not even x-ray abnormality, for decades, then suddenly discover that they suffer from a disabling disease contracted in the course of their employment.[73] Thus, a provision that bars claims made three years after the employees' last exposure cuts off a significant number of claimants whose symptoms develop more than three years after their last exposure. In addition, even if the disease is detected before the three year period has run, no claim can be filed, nor will the statute be tolled, until disablement occurs.[74]

Indiana's three year limitation was enacted in 1937, when less was known about the development of asbestosis. The Indiana Court of Appeals, after reviewing current medical facts, held "that the statute can no longer stand. To impose its ban is to violate the classic constitutional mandate, because to do so amounts to a practical denial of the very right to recovery that the statute was intended to provide."[75]

In reversing the court of appeals, the supreme court emphasized that a presumption of constitutionality must be afforded acts of the legislature.[76] The court found that the three year limitation was reasonable

71. *Id.*

72. 426 N.E.2d at 424-25 (discussion of studies published by Dr. Irving Selikoff and others).

73. *Id.* Bunker's claim before the Industrial Board of Indiana did not raise the constitutional issues. "The record reveals that Bunker's claim was predicated solely on the argument that . . . his 'exposure' to the asbestos was a continuing one . . . ." 441 N.E.2d at 17 (Hunter, J., dissenting). Nor did his claim cite the Selikoff medical studies. When Bunker raised the due process argument in his appellate brief, the Indiana Court of Appeals conducted its own independent review of the medical evidence that was available. 426 N.E.2d at 424-26.

74. *See* IND. CODE ANN. § 22-3-7-9(f) (Burns Supp. 1984) quoted *supra* note 46. The statute requires "disablement" as a predicate for compensation. This point is discussed by Justice Hunter in his supreme court dissent. 441 N.E.2d at 15-17.

75. 426 N.E.2d at 425. Judge Hoffman dissented, arguing that the repose interest in establishing statutes of limitation should prevail; a three year period may be short, but a limitation effectively running decades imposes too great a burden on the workers' compensation system. The legislature has the right, he held, to protect the defendant's right to be confronted with fresh evidence. *Id.* at 425-26 (Hoffman, J., dissenting).

76. 441 N.E.2d at 11-12. While once looked upon with disfavor, the presumption is now true for statutes of limitation. *Id.* at 12.

when enacted and sufficiently reasonable today to withstand a due process challenge.[77] Acknowledging that some claimants will be cut off by the three year statute, the court concluded that the unfortunate abrogation of some meritorious claims is in the nature of limitation periods. Moreover, the medical evidence indicated that manifestation of asbestosis is a function of length of exposure to the dust.[78] Thus, most claimants will have to spend much of their working life in contact with asbestos dust before the exposure will result in their disablement and will generally be well within the three year limitation period.[79]

The next part of this Article considers how a claimant like Bunker would fare in other states.

State Statutes of Limitation

The various state statutes of limitation and other timing provisions governing occupational disease claims present so many special requirements, trigger dates, and exceptions that any attempt at a general classification scheme would result in substantial over-simplification. Because the purpose of this Article is illustrative rather than encyclopedic, the focus is on a narrower model for analysis than that presented by occupational disease claims in general. This section examines how each state's limitation for filing claims would affect a claimant who, like Bunker, had limited exposure to asbestos dust and neither manifested symptoms nor discovered the disease until many years later.[80] In addition, the analysis indicates how victims of delayed manifestation occupational diseases under certain variant, yet similar, factual circumstances might fare under

77. *Id.* at 14.

78. *Id.*

79. "If this statute requires further updating through amendment, it remains the duty and responsibility of the legislature to do so." *Id.* at 14. In addition, the supreme court ruled that the court of appeals had improperly relied on medical evidence found outside the record. *Id.* at 14 (citing Hales & Hunter Co. v. Norfolk W. Ry. Co., 428 N.E.2d 1225, 1227 (Ind. App. 1981)).

The United States Supreme Court dismissed Bunker's direct appeal for want of a substantial federal question. 103 S. Ct. 1761 (1983). Bunker's appeal was brought under 28 U.S.C. § 1257(2) (1982), which provides that a decision may be reviewed by the Supreme Court "[b]y appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity." *Id.*

It is unknown whether this ruling can be interpreted as any sort of comment on the merits of Bunker's claim, and we decline here to find one, but it is entirely possible that the high court found the Indiana Court of Appeals use of outside medical evidence to be an adequate state ground for dismissing the case.

80. *See infra* notes 100-379 & accompanying text.

the same statute.[81] In this way, the economic and political forces underlying the various state limitation provisions are highlighted.[82]

The state laws are divided initially into two categories: those states in which the *Bunker*-type claimant is barred,[83] and those states in which he would recover benefits.[84] A summary chart of the material discussed in Part II appears in the appendix to this Article.

Statutes Which Bar the *Bunker*-type Claimant

Last Exposure Rules

Alabama

Several states commence their occupational disease disability limitation period from the date of the employee's last exposure to an injurious occupational hazard such as asbestos dust.[85] Alabama has one of the shortest limitation periods under this rule.[86] The Alabama statute requires an employee to file a verified complaint within one year of the date of injury.[87] Bunker's argument that his exposure was continuous would not succeed in Alabama because the statute specifically provides that the last exposure to the disease hazards must take place within the employment.[88] Both the manifestation of Bunker's disease and his discovery of

81. Where significant, a state's treatment of asbestos exposure is compared with other dust disease hazards, with radiation, with chemical poisons, and with occupational diseases, generally.

82. It is beyond the scope of this Article to trace the legislative histories of the states' special treatments of specific hazards such as lead, silica dust, cotton dust, ionizing radiation, compressed air, and, of course, asbestos. These individualized treatments do, however, provide clues to the industrial and political backgrounds of various regions of the country.

83. *See infra* notes 85-292 & accompanying text.

84. *See infra* notes 293-379 & accompanying text. The discussion is limited to the rules affecting disablement. The work-related death of the claimant creates a host of additional statutory complications; to consider the time limitations governing survivorship benefits would have made the paper unmanageable. For similar reasons we do not discuss the problem of multiple and successive employers, nor the question of which of these employers are, or should be, at risk. We do consider the controlling law question at several stages in the survey which follows, and we summarize our views on this issue in Part III of this Article.

85. For the Indiana rule, see *supra* note 46 & accompanying text.

86. ALA. CODE § 25-5-147 (1977). This section provides the limitation period for "occupational pneumoconiosis," defined as "[a] disease of the lungs caused by the inhalation of minute particles of dust over a period of time, which dust is due to causes and conditions arising out of and in the course of employment . . . ." *Id.* § 25-5-104(1). Although asbestosis is not specifically included in this section, presumably it would be governed by this limitation period. Special provisions are made for pneumoconiosis of coal miners. *See id.* § 25-5-170 to -180. The limitation period for occupational diseases generally is found at § 25-5-117.

87. *Id.* § 25-5-247.

88. "The date of injury shall mean . . . the date of last exposure to the hazards of the disease in the employment of the employer in whose employment the employee was last exposed to the hazards of the disease." *Id.* § 25-5-111.

its cause occurred after he left National Gypsum. Bunker was in National Gypsum's employ, however, for several years after his exposure to asbestos. If he had discovered his illness while still employed by Gypsum, he could argue that his earlier exposure to asbestos continued within his body, and thus he was continuously exposed "to the hazards of the disease" while still "in the employment." There is no appellate record of cases litigating this point in Alabama, nor has there been any recent challenge to the shortness of the limitation period.[89]

Arkansas

The Arkansas Workers' Compensation Act[90] provides that:

> a claim for compensation for disability on account of silicosis or asbestosis must be filed with the Commission within one [1] year after the time of disablement therefrom, and such disablement must occur within three [3] years from the date of the last injurious exposure to the hazards of silicosis or asbestosis . . . .[91]

Thus, an Arkansas victim of silicosis or asbestosis must not only be disabled within the three year limitation period, but also must be aware of the causal connection between his disability and the workplace hazard to bring his claim within the year following onset of the disease.

Hamilton v. Jeffrey Stone Co.[92] illustrates how these two requirements may bar claims. In *Hamilton*, the claimant left his occupation as a rock crusher operator due to a breathing difficulty which had been diagnosed as nonoccupational tuberculosis. The victim then worked as a security guard, but eventually his respiratory condition forced his total

89. In McLain v. GAF Corp., 424 So. 2d 1329, 1330 (Ala. Civ. App. 1982) an asbestosis claimant unsuccessfully argued that he could bring a claim for *medical* payments after the one year statute of limitations had run. He conceded that the statute barred his claim for *disability* compensation, but argued that the term "compensation" in the Alabama Workmen's Compensation Act excluded medical payments. *Id.* at 1329-30. He did not assert, however, that the shortness of the limitation period denied him his constitutional due process rights.

In 1980, the Alabama legislature amended its civil code to provide for a discovery rule in *tort* personal injury actions arising out of asbestos exposure. ALA. CODE § 6-2-30(b) (Supp. 1984). The constitutionality of this provision with respect to actions not already barred at the time it was enacted was upheld in Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263, 267 (Ala. 1981). Nevertheless, the last exposure and minimum exposure requirements of ALA. CODE § 25-5-147 (1977) covering workers' compensation remain in force.

90. ARK. STAT. ANN. §§ 81-1301 to -1363 (1976 & Supp. 1983).

91. *Id.* § 81-1318(a)(2) (1976). A similar requirement is found at *id.* § 81-1314(a)(7). A rebuttable minimum exposure requirement for asbestosis and silicosis is provided at *id.* § 81-1314(b)(2). An employee who cannot show five years exposure in the last 10 years preceding disablement can still rebut the presumption that his disability was not work related. *Id.* A claimant must also have resided in Arkansas for two of the five years; the residency requirement, however, is excusable if all five years were with the same employer. *Id.*

92. 641 S.W.2d 723 (Ark. Ct. App. 1982).

retirement. Subsequent to his retirement, however, his respiratory problem was diagnosed as silicosis, a disease arising out of Hamilton's employment as a rock crusher. Hamilton immediately filed a claim.

The Arkansas Workers' Compensation Commission denied Hamilton's claim because the claim was not filed within one year of disablement.[93] On appeal, Hamilton argued that under the statute both limitation periods commence from the time of correct diagnosis, rather than from the times of exposure and disablement, respectively.[94] Alternatively, Hamilton argued that unless construed with a discovery rule, the statute unconstitutionally violated his fourteenth amendment rights.[95]

The Arkansas Court of Appeals declined to find a discovery rule implied in the statute,[96] but it remanded the case to the Workers' Compensation Commission for consideration of the constitutional issues.[97] On remand,[98] Hamilton raised an equal protection argument which centered on two allegedly invidious classifications created by the limitation statute.[99] First, the limitation period for nonoccupational disease injuries runs "from the date of injury."[100] In some Arkansas workers' compensation cases, however, a discovery rule has been judicially adopted for nonoccupational diseases.[101] Thus, Hamilton argued, occupational disease victims are discriminated against in favor of "general injury" victims.

Second, Hamilton argued that the statute irrationally discriminated between silicosis and asbestosis victims, on the one hand, and other occupational disease claimants, on the other.[102] Although the former class may bring its claims within three years of the date of exposure,[103] in contrast to only two years for the latter class, asbestosis and silicosis victims are saddled with an additional limitation period which requires

93. *Id.*

94. *Id.* at 724.

95. *Id.*

96. *Id.* at 725.

97. *Id.*

98. Claimant's Brief before the Arkansas Worker's Compensation Comm'n, Hamilton v. Jeffrey Stone Co., Claim No. D016118, on remand from 641 S.W.2d 723 (Ark. Ct. App. 1982) [hereinafter cited as Claimant's Brief].

99. Claimant's Brief, *supra* note 98, at 2-8.

100. ARK. STAT. ANN. § 81-1318(a)(1) (1976 & Supp. 1983).

101. *See* Claimant's Brief, *supra* note 98, at 3 (citing Woodard v. ITT Higbie Mfg. Co., 609 S.W.2d 115 (Ark. Ct. App. 1980)).

102. *Id.* at 3.

103. ARK. STAT. ANN. § 81-1318(a)(2) (1976).

them to file within one year of disablement.[104] Although the cost of silicosis cases may once have been exceptionally high, thus providing a rational economic basis for the Arkansas Legislature to treat silicosis victims more restrictively, the disparity in cost is no longer the case.[105]

Georgia

The limitation periods in Georgia for asbestosis and silicosis dust diseases are similar to those of Arkansas: the statute bars claims if disablement occurs more than three years after the last exposure, or if the claim is filed more than one year after disablement.[106] In 1982 the dust disease provision was amended to include byssinosis, commonly known as brown lung.[107] Claims for all other occupational diseases must be brought within one year of the date of last injurious exposure.[108] Like Alabama, Georgia requires exposure to "the hazard of such disease *in such employment*."[109] Thus, no recovery is possible more than four years after termination of the employment in which the exposure to the hazard occurred.[110] Like many other states, Georgia provides a discovery-rule

104. *Id.*

105. Claimant's Brief, *supra* note 98, at 4-8.

106. GA. CODE ANN. § 114-801(b)(3) (1983). "Disablement" for asbestosis and silicosis means an incapacity to receive remuneration in either the worker's last employment or in any other occupation. *Id.* § 114-813. "Remuneration" means the lesser of weekly wages in excess of 33 1/3% of wages received at time of last exposure or $20 weekly. *Id.* Like Arkansas, *supra* note 91, Georgia also has a rebuttable minimum exposure presumption of five out of the preceding 10 years and an excusable, two year in-state residence requirement. *Id.* § 114-814. The state also has a system of medical examinations for asbestos and silica workers. *Id.* § 114-816. Finally, workers with either asbestos or silica-related diseases who are not yet disabled and who wish to continue in the employment may waive full compensation for any resulting aggravation of their condition. *Id.* § 114-817.

107. *Id.* § 114-801. An employer's constitutional challenge to this amendment on the ground that it was an impermissible retroactive impairment of contract was rejected in Canton Textile Mills, Inc. v. Lathem, 253 Ga. 102, 317 S.E.2d 189 (1984), *petition for cert. filed*, 53 U.S.L.W. 3281 (U.S. Oct. 9, 1984) (No. 84-309). The court, in expressly overruling its earlier decision in Bussey v. Bishop, 169 Ga. 251, 150 S.E. 78 (1929), agreed with the view expressed by Justice Jackson in Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) that "[s]tatutes of limitation find their justification in necessity and convenience rather than in logic." *Canton*, 253 Ga. at 105, 317 S.E.2d at 192. Thus, where the legislature has expressed an intent to apply its statute retrospectively to substantive matters, it can revive a claim that would have been barred under an earlier statute of limitations, especially a claim under the Worker's Compensation Act which is to be liberally construed in order to afford the injured claimant a remedy. *Id.* at 106, 317 S.E.2d at 192-93.

108. GA. CODE ANN. § 114-801(b)(3) (1983).

109. *Id.* (emphasis added).

110. *See* Vaughn v. Coal Operators Casualty Co., 106 Ga. App. 129, 130, 126 S.E.2d 428, 429 (1962); Patterson v. Employer's Mutual Liab. Ins. Co., 99 Ga. App. 325, 328, 108 S.E.2d 146, 148 (1959).

exception for radiation disease.[111]

A recent case applying Georgia law presented a controlling law issue similar to that in *Bunker*.[112] In *Hall v. Synalloy Co.*,[113] the plaintiffs, who had been exposed prior to the 1971 to a chemical called beta-napthyline (BNA), attempted to bring a common-law claim for negligence against their employer. Before 1971 only certain enumerated hazards could give rise to an occupational disease under the Georgia Occupational Disease Act, and BNA was not among them. The statute was amended in 1971, however, to allow coverage, according to five criteria, for certain hazards not specifically enumerated in the Act.[114] Under these criteria, BNA exposure was a covered occupational disease.

The plaintiffs argued that, because their exposure occurred prior to the 1971 amendment, the law at the time of their exposure should govern their claim even though their disablements occurred after 1971.[115] If the pre-1971 law governed, the plaintiff's injuries would not be covered by the Act, and they could pursue a common-law remedy against their employer.

The district court ruled that the date of injury was defined as the date of disablement for those employees who were employed by the defendant companies after the amendment was passed.[116] The court held that those employees and their employers by implication incorporated the new occupational disease criteria into their ongoing employment contractual relationships and would be bound by them later when disablement finally occurred.[117] But employees whose contractual relationship terminated prior to 1971 had not accepted the new law, and this group, the court ruled, could maintain common-law actions against their employers.[118]

A claimant like Bunker seeking common-law relief in Georgia under the *Synalloy* theory would be frustrated because asbestosis was one of the enumerated diseases prior to 1971.[119] If, however, the claimant alleged

111. GA. CODE ANN. § 114-801(c) (1983).

112. *See supra* notes 36-44 & accompanying text.

113. 540 F. Supp. 263 (S.D. Ga. 1982).

114. *See* GA. CODE ANN. § 114-802(3)(F) (1983). This subsection defines occupational disease as "those listed in this paragraph." *Id.* The paragraph includes a number of chemical poisonings caused by exposure to X-rays, asbestosis, silicosis, and other occupational diseases. *Id.* Until the legislature enacted a catchall provision, GA. CODE ANN. § 114-802(3)(F) (1983), the enumerated list of diseases was exclusive.

115. 540 F. Supp. at 266.

116. *Id.* at 274.

117. *Id.*

118. *Id.*

119. *See supra* note 114.

byssinosis due to exposure to cotton dust before 1971 and, like Bunker, had left the employment prior to 1971, when byssinosis presumably was included under the five criteria test,[120] under *Synalloy* the claimant would retain common-law rights. In Georgia, the right to bring a tort action based on a pre-1971 exposure has real value for a plaintiff because Georgia, unlike Indiana, recently adopted a liberal discovery rule for tort claims.[121] The tort statute of limitations in Georgia begins running only when plaintiffs discover both the nature of their illness and its causation by the tortfeasor's act.[122]

Idaho

Idaho, like some other states,[123] subscribes to a version of the last exposure rule. The occupational disease section of Idaho's Workmen's Compensation Law[124] enumerates certain diseases and hazards,[125] but states that, because "additional toxic or harmful substances or matter are continually being discovered and used and misused, the above enumerated occupational diseases are not intended to be exclusive . . . ."[126] Although additional diseases are compensable, claims for "hazards which are common to the public in general" are barred.[127] Asbestosis is not among the enumerated diseases, but silicosis is.[128]

The Idaho claim limitation period is one year from "the last injurious exposure to such disease in such employment,"[129] granting a four year exception for silicosis[130] and a discovery rule for ionizing radiation.[131] An occupational disease must be incurred in the employment,[132]

120. Byssinosis became a *listed* dust disease in 1982, but arguably it could have qualified earlier under the catchall section. GA. CODE ANN. § 114-802(3)(F) (1983).

121. *See* King v. Seitzingers, Inc., 160 Ga. App. 318, 319-20, 287 S.E.2d 252, 255 (1981) (alleged negligence of nonemployer caused plaintiff's lead poisoning).

122. The *King* court found

> that the appellant's cause of action did not accrue and the statute of limitations did not run against him until he knew or through the exercise of reasonable diligence should have discovered not only the nature of his injury but also the causal connection between the injury and the alleged negligent conduct of appellee. *Id.* at 320, 287 S.E.2d at 255.

123. Illinois, *infra* notes 148-53 & accompanying text, Indiana, *supra* notes 45-50 & accompanying text, Iowa, *infra* notes 154-57 & accompanying text.

124. IDAHO CODE § 72-437 to -450 (1973 & Supp. 1984).

125. *Id.* § 72-438.

126. *Id.* § 72-438(12).

127. *Id.*

128. *Id.* § 72-438(11).

129. *Id.* § 72-439 (1973).

130. *Id.*

131. *Id.* § 72-448(2) (1973 & Supp. 1984).

132. *Id.* § 72-102(17)(a) (1973 & Supp. 1983); *id.* § 72-439 (1973).

and disablement must be total.[133] A silicosis claim requires exposure to silica dust five out of the ten years preceding disablement, and of those five years of exposure, two must have been in Idaho.[134] In addition, the claimant must give notice of an occupational disease within sixty days of its first manifestation[135] and within five months of cessation of the employment in which the disease was contracted.[136] Finally, an employer "shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer."[137]

In *Jones v. Morrison-Knudsen Co.*,[138] the Idaho Supreme Court described the above requirements as "a maze of limitations."[139] The claimant in *Jones* suffered allergic contact dermatitis that was attributed to chromate in the cement with which he worked. The surety had paid the medical expenses Jones had incurred for a prior attack of dermatitis while employed by Morrison, but refused a new claim by Jones following an interruption in his employment with Morrison. Jones had left Morrison to work with cement for other employers and then returned to work for Morrison. Although he then did no cement work, the dermatitis continued.

The surety advanced several limitation defenses. First, it argued that more than one year had elapsed between the claimant's last exposure to chromates and his "disablement."[140] The supreme court acknowledged that the claimant may have been disabled within the meaning of the Idaho statute because he had developed an allergy that prevented him from working "in any occupation which exposes him to chromates."[141] The Idaho statute defines disablement as the employee's total incapacitation "from performing his work in the last occupation in which [the employee was] injuriously exposed to the hazards of such disease."[142] Thus, in Idaho, a person capable of working at a wide variety of jobs apparently could be considered totally disabled if an occupational

133. *Id.* § 72-102(17)(c) (1973 & Supp. 1983). Partial disability from silicosis is not compensable, *id.* § 72-444 (1973), but discharge for nondisabling silicosis is. *Id.* § 72-446.

134. *Id.* § 72-443 (1973). The two year residency requirement is excusable if the entire five year exposure period occurred during employment with the same employer. *Id.*

135. *Id.* § 72-448 (1973 & Supp. 1984). Silicosis claimants, however, may give notice at any time during the four year limitations period.

136. *Id. But see infra* note 147 & accompanying text.

137. *Id.* § 72-439 (1973).

138. 98 Idaho 458, 567 P.2d 3 (1977).

139. *Id.* at 460, 567 P.2d at 5.

140. *Id.* at 460-61, 567 P.2d at 5-6.

141. *Id.* at 462, 567 P.2d at 7.

142. IDAHO CODE § 72-102(17)(c) (Supp. 1984).

disease rendered him physically unfit for the employment he was in at the time of exposure. In *Jones*, however, the Industrial Commission had failed to fix dates of last exposure and disablement, or to find that the claimant was in fact disabled; thus, the court remanded the case to the Commission for findings on these issues.[143]

The court also rejected the Commission's interpretation of the sixty day exposure rule to require continuous exposure to the hazard prior to the first manifestation of disease.[144] The court held that any sixty days sufficed, continuous or not, even after the employee became aware of the affliction.[145] The court also noted that the claimant's notice to the employer occurred both within sixty days of the first manifestation of his disease and while he was still in the initial employ of this employer.[146] In the court's view, this notice was sufficient to satisfy the sixty day notice requirement; the five month termination provision applied only when the first manifestation occurred after the employee has left his employment.[147]

143. 98 Idaho at 464-65, 567 P.2d at 7.

144. *Id.* at 462-63, 567 P.2d at 7.

145. *Id.* at 462, 567 P.2d at 7.

146. *Id.* at 462-63, 567 P.2d at 7-8.

147. *Id.* at 463, 567 P.2d at 7-8. Once an employee contracts a disease and notifies his employer of its manifestation, "it does not require a notice to the employer upon each manifestation of the disease." *Id.* at 463, 567 P.2d at 8.

The court also observed that the claimant was requesting *additional* compensation, rather than pressing an *original* claim. *Id.* In additional compensation cases, the court noted, it was first necessary to resolve a conflict between two contradictory code provisions. One subsection, a specific statute which is part of the Occupational Diseases Act, bars claims for additional compensation brought more than one year after the last payment for compensation. *Id.* at 464, 567 P.2d at 9 (citing IDAHO CODE § 72- 448(3)). This provision, standing alone, would have barred Jones' claim. Another, more general, code section provides for a limitation period which gives a claimant "five (5) years from [the] . . . *date of first manifestation of an occupational disease*, within which to make and file with the commission an application requesting a hearing for further compensation and award." *Id.* (quoting IDAHO CODE § 72-448(3)) (emphasis added).

The court chose to recognize the general limitation over the specific. It gave three reasons for this atypical interpretation. First, the language in the general provision dealing with occupational disease was an amendment enacted after passage of the specific one year rule. *Id.* A second ground was found in the general principle "that the Workmen's Compensation Act is to be construed liberally in favor of claimants." *Id.* Third, the court noted that the Idaho Occupational Diseases Act "suffers from over-complexity" implying that the court's interpretation of the statute would be more likely to rationalize the limitation scheme of the Act, rather than to destroy it, as had been argued by the respondent. *Id.* The Idaho Supreme Court made clear that it was impatient with the legislature's efforts to constrain the objectives of the state's workers' compensation system by means of complex limitation statutes, and that it would construe this limitation legislation narrowly. *Id.* at 464 n.7, 567 P.2d at 9 n.7 (quoting State v. Boyenger, 95 Idaho 369, 509 P.2d 1317 (1973)).

Illinois

The Illinois Workmen's Occupational Diseases Act[148] contains limitation language similar to that of the Indiana Occupational Diseases Act.[149] Illinois claimants may bring claims within two years from the date of last exposure, although the period is extended to three years for exposure to silica or beryllium dust.[150] Illinois, however, provides a twenty-five year limitation period for radiation sickness instead of a discovery rule.[151] The practical result of the Illinois and Indiana approaches to slowly developing radiation sickness may in most cases[152] be similar, yet the Illinois legislature has demonstrated a predisposition for closure, which may retain for its workers' compensation scheme the high degree of predictability fundamental to the legislation. In 1984 Illinois increased its last exposure rule to twenty-five years for asbestos,[153] which would still be too short a period for the *Bunker*-type claimant to recover.

Iowa

Iowa also follows a general limitation of one year "after the last injurious exposure to such disease," granting a three year exception for pneumoconiosis,[154] the characteristic fibrotic condition of the lungs caused by the inhalation of dust particles.[155] This three year exception, once limited to silicosis but now clearly embracing asbestosis, is also constrained by the following presumption:

> In the absence of conclusive evidence in favor of the claim, disability or death from pneumoconiosis shall be presumed not to be due to the nature of any occupation . . . unless during the ten years immediately preceding the disablement of the employee who has been exposed to the inhalation of dust particles over a period of not less than five years, two years of which shall have been in employment in this state.[156]

148. ILL. ANN. STAT. ch. 48, §§ 172.36-.62 (Smith-Hurd 1966 & Supp. 1984-1985).

149. *See supra* notes 45-79 & accompanying text.

150. ILL. ANN. STAT. ch. 48, § 172.36(1)(f) (Smith-Hurd Supp. 1984-1985).

151. *Id.*

152. Not in all cases, however. *See Cleanup to End Downstate City's Radioactive Stigma*, Chicago Sun-Times, Jan. 13, 1984, at 30, col.1 (This article reports the cleanup of radioactive wastes in Ottawa, Illinois, known as "town of the living dead" because many female workers at the now closed Luminous Processes Inc. plant allegedly suffered high cancer incidence from licking radium-tipped brushes used to paint clock-faces back in the 1920's and 1930's. While a number of victims worked at the plant until the 1970's, others left much earlier. Their last exposures were more than 25 years prior to the onset of their symptoms.)

153. WORKERS' COMP. L. REP. (CCH) No. 67, at 5 (June 22, 1984).

154. IOWA CODE ANN. § 85A.12 (West 1984).

155. *Id.* § 85A.13(1).

156. *Id.* § 85A.13(2).

One commentator has concluded that this rebuttable presumption based on exposure to dust requires "more than merely being subject to a contract to work in a place where such a hazard exists; the claimant must physically have spent the required time in actual contact with the . . . dust."[157]

Kansas

The Kansas statute treats occupational diseases like injuries by accident[158] and no longer contains a list of enumerated diseases caused by corresponding industrial processes.[159] Because the states that follow the enumerated diseases[160] model now generally provide that the lists are nonexclusive, the practical results from the two treatments have become similar. Under each approach, however, the occupational disease must be "connected with the particular type of employment and have resulted from the source as a reasonable consequence of the risk."[161]

A claim is compensable under the Kansas statute if filed within one year of the last exposure, although the statute provides for a three year exception for silicosis resulting in death and no limitation on claims for disablement due to radiation.[162] In the case of silicosis, Kansas, like other states,[163] establishes a rebuttable presumption if the victim was exposed for five of the ten years preceding disablement.[164] If, however, a claimant is employed by the same employer for those five years, his right to compensation is not impaired although he worked outside of Kansas

157. Note, *The Iowa Occupational Disease Law*, 34 IOWA L. REV. 510, 515 (1949) (citing Bingaman v. Baldwin Locomotive Works, 159 Pa. Super. 29, 46 A.2d 512 (1946)).

158. KAN. STAT. ANN. § 44.5a01 (1982).

159. Prior to 1963, the Kansas statute provided that occupational diseases were injuries by accident, but it also listed as compensable an *exclusive* set of occupational diseases. In Watson v. International Milling Co., 190 Kan. 98, 372 P.2d 287 (1962), the claimant argued that his bronchial asthma was the result of a continuing series of accidents caused by his sensitivity to wheat dust. The court ruled, however, that claimant's condition was in the nature of an occupational disease, rather than a series of successive traumas, and that his wheat dust sensitivity, not being listed, was uncompensable. *Id.* at 100, 372 P.2d at 288.

160. For a discussion of early problems dealing with defining the term "occupational disease," see Angerstein, *Legal Aspects of Occupational Disease*, 18 ROCKY MTN. L. REV. 240, 256-74 (1945-1946). Defining occupational disease "by schedule" is attributed primarily to precedent established in the English Workmen's Compensation Act of 1925. *Id.* at 266-72.

161. KAN. STAT. ANN. § 44.5a01 (1982). Some states follow a combined approach, defining occupational diseases as injuries by accident and also listing a number of them together with a catchall section for those occupationally related diseases not specifically mentioned. *See, e.g.*, N.C. GEN. STAT. § 97-52 (1979).

162. KAN. STAT. ANN. § 44.5a01(c) (1982).

163. *See, e.g.*, Iowa's broader pneumoconiosis exception *supra* note 154 & accompanying text.

164. KAN. STAT. ANN. § 44.5a10 (1982).

part of that time.[165]

Maine

The Maine Workers' Compensation Act[166] requires that the employee file her claim "within 2 years after the date of injury."[167] For occupational disease claims, "[t]he date when an employee becomes . . . incapacitated . . . from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease shall be taken as the date of injury under the Workers' Compensation Act."[168] These two provisions would form a discovery rule based on disability except that the date of incapacity is further limited by a section which provides that occupational disease victims cannot recover unless their incapacity "results within 3 years after the last injurious exposure to such disease in the employment."[169]

In addition to this general last exposure rule, a special provision for silicosis states that:

> [i]n the absence of evidence in favor of the claim, disability or death from silicosis shall be presumed not to be due to the nature of the occupation, unless during the 15 years immediately preceding the date of disability the employee has been exposed to the inhalation of silica dust over a period of not less than 2 years.[170]

Until recently, this rebuttable presumption governed asbestos-related diseases and silicosis.[171] If Bunker had claimed under the Maine statute when the presumption applied to asbestos, he might have prevailed. Although his exposure to asbestos was less than two years and nonexistent during the fifteen years preceding his temporary disability, the unequivocal diagnosis of his asbestosis presumably could rebut the statutory presumption that his impaired respiratory function was nonoccupational.

In 1983 the Maine minimum exposure presumption for asbestos-related diseases was replaced by a section exempting these diseases from the three-year last exposure rule.[172] This exemption, however, applies only to cases in which the last injurious exposure occurred on or after November 30, 1967.[173] Thus, the 1983 exemption from the Maine last exposure requirement does not provide relief to all asbestosis

165. *Id.*
166. ME. REV. STAT. ANN. tit. 39, §§ 1-196 (1978 & Supp. 1979-1983).
167. *Id.* § 95.
168. *Id.* § 186.
169. *Id.* § 189.
170. *Id.* § 194.
171. *Id.* § 194A (Supp. 1979-1983) (repealed 1983).
172. *Id.* § 194B(6).
173. *Id.* § 194B(2).

claimants.[174]

Like Indiana, Maine has encountered a controlling law question. In *Davis v. Bath Iron Work Corp.*,[175] the plaintiff, an asbestosis victim, brought a negligence claim against his employer arguing that asbestosis became a disease covered by the statute in Maine only after his employment had terminated. As in *Bunker*, the court decided that a claim under the Workmen's Compensation Act was Davis' sole remedy. The court apparently conceded that its holding gave retrospective effect to the statute, but it justified its decision on the ground that "the Legislature gave special consideration to the gradual, degenerative nature of asbestosis"[176] when it inserted the fifteen year presumptive period for the disease to develop and for the symptoms to become manifest. In *Davis*, however, the claimant, unlike Bunker, was eligible for compensation under the Maine statute.

North Carolina

North Carolina's occupational disease statute[177] follows the enumerated disease model[178] and the injury by accident model.[179] The legislative history of section 97-53(13) reveals increasing sophistication about the range of medical conditions caused by workplace exposure to toxic substances. Prior to 1963, this section covered "[i]nfection or inflammation of the skin, eyes or other external contact surfaces or oral or nasal cavaties due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gasses or vapors, and any other materials or substances."[180] In 1963 the provision was amended to include infections or inflammations of "any other internal or external organ or organs of the body caused by exposure to one of the above-named substances."[181] And in 1971, the cur-

174. Bunker was last exposed to asbestos dust before 1967. Interestingly, the new statute provides that for incapacity from asbestos-related diseases occurring prior to October 1, 1983, late claim filing can be excused until January 1, 1985. *Id.* § 194B(5). Unfortunately for a *Bunker*-type claimant, the statute also provides that no retroactive compensation will be available for pre-1983 periods of incapacity. *Id.* § 194B(6). Bunker's total temporary disability took place entirely in 1976.

175. 338 A.2d 146 (Me. 1975).

176. *Id.* at 148.

177. The sections of North Carolina's Workers' Compensation Act dealing with occupational disease are found at N.C. GEN. STAT. §§ 97-52 to -76 (1979 & Supp. 1983).

178. *Id.* § 97-53.

179. *Id.* § 97-52.

180. Wood v. J.P. Stevens & Co., 297 N.C. 636, 642, 256 S.E.2d 692, 697 (1979) (quoting Act of Mar. 26, 1935, ch. 123, 1935 N.C. Pub. Laws 131, as amended by Act of June 12, 1957, ch. 1396, § 6, 1957 N.C. Sess. Laws 1590).

181. *Id.* at 642, 256 S.E.2d at 697 (quoting Act of June 13, 1963, ch. 965, § 1, 1963 N.C. Sess. Laws 224).

rent statutory language was enacted expanding the catchall section to include "[a]ny disease . . . proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life."[182] In *Booker v. Duke Medical Center*,[183] the North Carolina Supreme Court observed that the "clear intent of the General Assembly in enacting the current version of G.S. 97-53(13) was to bring North Carolina in line with the vast majority of states by providing comprehensive coverage for occupational diseases."[184]

In North Carolina, the term "occupational disease" now includes diseases exhibiting either gradual or rapid onset. In *Booker*, the court held that serum hepatitis, contracted by a hospital employee, was an occupational disease despite being "caused by a single exposure to a virus,"[185] rather than by gradual, "prolonged exposure to harmful conditions,"[186] the incremental process commonly associated with the term "occupational disease." The court did observe, however, that the slow development of most occupational diseases complicated fixing the time of disablement under the North Carolina statute.[187] Section 95-52 provides that "[d]isablement or death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident."[188] The court noted that the date of "disability" is defined in other jurisdictions, as well as in North Carolina, as "incapacity because of injury to earn the wages which the employee was receiving in the same or any other employment"[189] and ruled that the date of the accident was the date of disability, the day full wages were terminated.[190] Claimants in North Carolina must bring their claims within two years of "the accident" and, though *Booker* concerned a death claim, presumably the same definition of "injury by accident" running from date of disable-

182. *Id.* at 643, 256 S.E.2d at 697 (quoting Act of June 14, 1971, ch. 547, § 3, 1971 N.C. Sess. Laws 477).

183. 297 N.C. 458, 256 S.E.2d 189 (1979).

184. *Id.* at 469, 256 S.E.2d at 196. The court reviewed the historical shift in occupational disease provisions from exclusive lists of covered diseases to coverage for any disease which can be shown to be occupationally related. *Id.* at 469 & n.1, 256 S.E.2d at 196 & n.1.

185. *Id.* at 470, 256 S.E.2d at 197.

186. *Id.*

187. *Id.* at 483, 256 S.E.2d at 204-05.

188. *Id.* at 482, 256 S.E.2d at 204.

189. *Id.* at 483, 256 S.E.2d at 205 (quoting N.C. GEN. STAT. § 97-2(9) (1979)).

190. *Id.* at 483, 256 S.E.2d at 205. Booker's hepatitis was diagnosed on July 3, 1971. He worked until October 1, 1973. He was paid in full until October 1, 1973 and died January 3, 1974. The statute leaves open the question of whether an employee who can no longer work because of an occupational health impairment, but who continues to receive salary, will have the statute of limitations tolled for him.

ment would govern a claim for disability benefits.[191]

The North Carolina statute has an independent scheme for asbestosis, silicosis, and lead poisoning victims.[192] Prior to 1981, employers' potential liability terminated two years after their employees' last exposure to those diseases.[193] In addition, employees exposed to asbestos or silica dust were—and still are—required to undergo periodic medical examinations provided by their employers.[194] If asbestosis or silicosis are discovered, then after hearings the Industrial Commission can order the removal of the employee, with compensation, from the occupation.[195] A 1981 amendment removed silicosis from the last exposure rule, increased the limitation period for asbestos exposure to ten years, and left in place the requirement for a two-year exposure to lead poisoning.[196] The basic scheme of medical examinations, hearings, and removal with compensation[197] for asbestosis and silicosis exposure was left intact.[198]

A claimant like Bunker would be barred in North Carolina because the manifestation of his symptoms and the occurrence of his temporary total disability occurred more than ten years after his exposure to asbestos.[199] If, however, he had been exposed to silica dust, rather than asbestos dust, the last exposure bar probably[200] no longer would apply to him if he were finally and totally disabled after 1981 when silica dust was deleted as a "last exposure" hazard.[201]

The 1981 amendment was the basis for a controlling statute issue similar to that in *Bunker*. The North Carolina Supreme Court addressed

191. For survivors to recover death benefits, the statute provided that the employee must die within two years of the accident (disability or inability to earn wages). The *Booker* court noted that there was no similar restriction for disablement from most occupational diseases. It must be noted, however, that disability itself triggers the benefit payments; there is no later event, *i.e.* death, that need occur. The court did note the legislative restrictions placed on asbestosis, silicosis, and lead poisoning, but ruled that any inequity resulting from such special treatment was a matter for the legislature to remedy. 297 N.C. at 484, 256 S.E.2d at 205.

192. N.C. GEN. STAT. §§ 97-58 to -76 (1979 & Supp. 1983).

193. *Id.* § 97-58 (1979) (amended 1981).

194. *Id.* § 97-60 (1979).

195. *Id.* § 97-61.5 (Supp. 1983).

196. *Id.* § 97-58.

197. *Id.* § 97-61.7 (1979).

198. *Id.* §§ 97-60 to -61.7 (1979 & Supp. 1983).

199. Bunker's last exposure was in 1950; his four week disability was in 1976.

200. So long as the post-1981 version of § 97-58 is held applicable to his claim, the bar will not apply.

201. If, under the rule in *Booker v. Duke Medical Center*, the claimant's disability occurred in 1981, that event would set the date of his "accident." *See supra* notes 183-91 & accompanying text. To discover whether this analysis will also be determinative in settling the issue of which statute applies in North Carolina, see *infra* notes 202-15 & accompanying text.

this issue in *Wood v. J. P. Stevens*.[202] The claimant in *Wood* sought benefits for disablement resulting from byssinosis caused by exposure to textile dust prior to 1958, the date the claimant had left the hazardous employment. The claimant became totally disabled in 1975. The lower court observed that under the pre-1963 definition[203] byssinosis could qualify if the term "pulmonary air passages" was included in the term "oral or nasal cavities."[204] Thus, the lower court ruled that Wood should have been permitted to present evidence that the statutory definition in effect during her exposure to textile dust was sufficient to support a compensable claim.[205] But the court also noted that Wood might be able to invoke the catchall definition of occupational disease that was enacted in 1971.[206] Although byssinosis is not one of the enumerated diseases in North Carolina, byssinosis might qualify as an occupational disease under the "catchall" of section 97-53(13) enacted in 1971.[207]

The North Carolina Court of Appeals ruled that the 1971 amendment was inapplicable to this case because the amendment applied only to cases originating before 1971.[208] It held that occupational disease cases "originate" when the diseases are contracted, and contraction cannot occur after the employee leaves the hazardous employment.[209] The supreme court, however, held that a case originates when a cause of action accrues and that in occupational disease cases accrual takes place

202. 297 N.C. 636, 256 S.E.2d 692 (1979).

203. *See supra* note 180 & accompanying text.

204. 297 N.C. at 640-42, 256 S.E.2d at 695-96.

205. *Id.* at 641-42, 256 S.E.2d at 696.

206. *Id.* at 642-43, 256 S.E.2d at 697. The court ruled that Wood could present evidence that she had become disabled after the 1971 amendment had been enacted. If she could prove post-1971 disablement, then she could invoke the language of the later statute. *Id.* at 643, 256 S.E.2d at 702.

207. *See supra* note 182 & accompanying text. The *Wood* court remanded the claim to the Commission for a hearing de novo. The Commission's earlier denial was based on applying definitions of occupational disease taken from earlier versions of § 97-53(13). On its face, the 1971 amendment (current version) presented no bar to recovery for byssinosis.

In the subsequent case of Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 1982), the claimant was disabled by byssinosis. "The defendants did not take exception to or make any cross assignments of error with regard to the Industrial Commission's finding adopting the consulting physician's opinion that plaintiff was totally and permanently disabled by byssinosis in 1978." *Id.* at 515, 290 S.E.2d at 639 (Meyer, J., dissenting). In his dissent, Justice Meyer noted that the definition of byssinosis was consistent with the catchall section of § 97-53(13) as it existed prior to 1971. *Id.* at 516-17, 290 S.E.2d at 640. He noted, however, that the Commission had not made a "determination that the claimant's disease is 'due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment,' " as required under the 1971 amendment. *Id.* at 518, 290 S.E.2d at 643.

208. 297 N.C. at 643, 256 S.E.2d at 697.

209. *Id.*

upon disablement.[210] The court endorsed the proposition that "the date of disablement [provides] the most workable solution to the difficult problem of determining which law to apply in cases of occupational disease."[211]

In response to the argument that applying the amendment to pre-enactment employment and exposures allows retroactivity, the court agreed with the view that a "law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment . . . . [T]he right to compensation does not accrue and the rights of the parties do not become fixed until the occurrence of the event, in this case appellant's disability . . . ."[212]

Finally, the court ruled that applying the law in effect at the time of disablement was not an unconstitutional impairment of the employment contract. While recognizing contrary authority, the court held that the relationship between a covered employee and his covered employer was distinct from the traditional contract in which the rights and duties of the parties are fixed at the time of contract formation.[213] In an employment contract the rights and liabilities imposed by law (for example, the workers' compensation law) can change at any time as the law is revised, even after the employment relationship has been terminated. The essential constitutional question that the court would consider "is not whether the amendment affects some imagined obligation of contract but, whether it interferes with vested rights and liabilities."[214] Inasmuch as the employee has no claim prior to disablement and the employer no liability, those rights and liabilities have not yet vested.[215]

210. *Id.* at 643-44, 256 S.E.2d at 697.

211. *Id.* at 645, 256 S.E.2d at 698 (quoting 4 A. LARSON, *supra* note 2, § 95.21).

212. *Id.* at 646, 256 S.E.2d at 699 (quoting Frisbie v. Sunshine Mining Co., 93 Idaho 169, 172, 457 P.2d 408, 411 (1969)).

213. *Id.* at 648-49, 256 S.E.2d at 700-01.

214. *Id.* at 650, 256 S.E.2d at 701.

215. *Id.* For a further analysis of the *Booker* and *Wood* cases, see *1979 Survey of Developments in North Carolina Workers' Compensation Law*, 58 N.C. L. REV. 1185, 1185-95 (1980); *see also* Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982). In *Smith* the claimant was permanently partially disabled by byssinosis in 1970, but filed no claim for disability or medical expenses until 1978 at which time he was determined to be totally disabled. He was given an award for his prior partial disability, but denied lifetime medical expenses for his total disability pursuant to a post-1973 amendment to the statute. Ultimately, the supreme court addressed the issue of which law controlled Smith's claim for total disability. The employer argued that when Smith was partially disabled in 1970, his rights vested because he was then able to bring a claim for partial disability under the statute. The supreme court held, however, that Smith's total disability was a separate claim and, following its rule in *Wood*, would be governed by the statute in effect at the time of total disability. The *Smith* court's holding might be limited, however, to cases in which no claim for partial disability is made prior to the enactment of a liberalizing amendment. Because this point was not clear, Justice

In North Carolina, the statute in effect on the date of disablement controls a claim. A silicosis claimant protected by the 1971 amendment, but with a history of exposure like Bunker's, would lose because of that state's minimum exposure and residence requirement rule; employer liability for asbestosis or silicosis may arise only if the employee has been exposed to the dust within North Carolina for at least two years.[216] Interestingly, this provision differs from most minimum-exposure residence requirements by requiring that "no part of such period of two years shall have been more than ten years prior to the last exposure,"[217] *rather than requiring that the disablement must have taken place in the ten year period preceding disablement.*

South Carolina

In South Carolina, the employee must file a claim within two years of receiving a diagnosis of an occupational disease.[218] The statute further requires, however, that the employee's disease must be "contracted" within one or two years of exposure to the hazard, depending on the disease.[219]

In *Glenn v. Columbia Silica Sand Co.*,[220] the South Carolina Supreme Court addressed the issue of determining the date of contraction of an occupational disease. The court ruled that to construe "contraction" as "referring to a point in time prior to that when, medically, the disease has been definitely found to be present, would be to inject uncertainty into the calculation of the period limited for the filing of claims."[221] Under the court's interpretation, a disease is contracted no earlier than the date of definite diagnosis. If, however, that diagnosis occurs more than one year after last exposure to a hazard, or two years in the case of pulmonary diseases, the claimant presumably would be barred. In Vermont, occupational diseases are treated as injuries by acci-

Meyer, in dissent, feared "that the majority opinion will open a Pandora's box of claims never contemplated by the legislature." *Id.* at 520, 290 S.E.2d at 642 (Meyer, J., dissenting).

216. N.C. STAT. ANN. § 97-53(13) (Supp. 1983). Bunker was exposed to asbestos dust for only 22 months while in Indiana. *See supra* notes 29-31 & accompanying text.

217. *Id.*

218. S.C. CODE ANN. § 42-15-40 (Supp. 1983).

219. *Id.* § 42-11-70 (1976).

220. 236 S.C. 13, 112 S.E.2d 711 (1960).

221. The *Glenn* court was not required to fix the date of contraction to decide the case before it. It ruled that, for liability to attach to an employer or its carrier, total disability (no compensation for partial disability at the time in South Carolina) had to occur. *Id.* at 19-20, 112 S.E.2d at 714-15. In the case at bar, medical determination of causation and disablement occurred at the same time.

dent.[222] In the case of an occupational disease, an injury occurs when a licensed physician sets out in writing on a proper form that the claimant has an occupational disease.[223] Except for radiation sickness, to receive compensation all occupational disease claimants must be disabled within five years of their "last injurious exposure to such disease in the employment."[224]

Minimum Exposure Rules

Of the twelve "last exposure" statutes discussed in the previous subsection, nine have some type of minimum exposure requirement in addition to their last exposure bars.[225] This subsection discusses two states, Nevada and New Mexico, which have minimum exposure provisions that are sufficient to bar claimants like Bunker even without last exposure rules. A later subsection discusses minimum exposure provisions under which claimants like Bunker would prevail, while other claimants would be barred.[226]

Nevada

Nevada has a nonrebuttable minimum exposure rule for silicosis[227] and other dust diseases.[228] Claimants must be exposed within Nevada to harmful quantities of dust for not less than three out of the ten years preceding disablement or death.[229] These provisions bar claimants with an exposure history like Bunker's. Occupational disease claims generally must be filed "within 90 days after the employee has knowledge of the disability and its relationship to his employment . . . ."[230]

Nevada occupational diseases claims are compensable only for tem-

222. VT. STAT. ANN. tit. 21, § 1001 (1978 & Supp. 1984).
223. *Id.* § 1004.
224. *Id.* § 1006.
225. Only Illinois, Indiana, and Vermont do not.
226. *See infra* notes 374-79 & accompanying text.
227. NEV. REV. STAT. § 616.460(4) (1983).
228. *Id.* § 617.470.
229. *Id.* §§ 617.460(4), .470. These provisions would bar *Bunker*-type claimants.
230. *Id.* § 617.330. Until it was amended in 1983, the Nevada statute required that occupational disease disablement claims be brought within 12 months of the disease's contraction. *Id.* § 617.440 (amended 1983). "Contraction," however, was not defined in the Nevada statute. If disease contraction were interpreted as an event occurring no later than the cessation of employment, the 12-month limitation would require disability to have occurred within the critical year following employment and would effectively be a last employment rule. If, however, contraction were liberally interpreted to mean the manifestation of symptoms, the 12-month period could, in the case of slow-developing diseases, begin running long after the employment ended. *See infra* notes 313-16 & accompanying text.

porary and permanent *total* disability.[231] In cases of injury by accident, however, benefits for *partial* disability are also payable. In *Holt v. Nevada Industrial Commission*,[232] the claimant argued that the classification created by the two types of injury recognized by Nevada compensation law—accident and disease—was a denial of equal protection. The Supreme Court of Nevada held, however, that the legislature was justified in making the distinction because the slowly developing nature of occupational disease and its "exacerbation-remission cycle makes it difficult to assess the anatomical percentage which may be assigned to a partial disability."[233]

If the Nevada Legislature later seeks to provide such compensation to a diseased employee,[234] it should be prepared for an additional consequence: an amendment to recognize claims for partial disability may also affect which occupational disease law will apply to specific claims. In *Prescott v. United States*,[235] the federal court ruled that a Nevada claim for compensation was governed by the law in effect at the time of disability, not at the time of contraction, *because the claim does not arise until disability occurs.*[236] Occupational disease statutes frequently have been amended. Thus, if a claim accrues at the moment of disability and the term "disability" includes partial disability, different laws or amendments might control claims than would be the case if only total disability were recognized.[237]

New Mexico

Section 52-3-42(A) of the New Mexico Occupational Disease Disablement Law[238] provides that a claim "based upon silicosis, asbestosis,

231. NEV. REV. STAT. § 616.430(1) (1983) provides: "Every employee . . . [is] entitled to the compensation provided . . . for temporary disability, permanent disability, or death . . . ."

232. 94 Nev. 257, 578 P.2d 752(1978).

233. *Id.* at 258, 578 P.2d at 753.

234. The court recommended that it would "be a better practice to provide such compensation to a diseased employee." *Id.*

235. 523 F. Supp. 918 (D. Nev. 1981). When discussing the claimant's argument, the court uses the word "injury" instead of "contraction."

236. The court noted that this rule was "a well-settled exception to the 'vested rights' general rule." *Id.* at 926.

237. Under the "12 months of the disease's contraction" rule in effect prior to the 1983 amendment, *supra* note 230, a second effect from recognizing partial disability could be expected: the operation of the 12-month limitation period between disease contraction and disablement may prove to be less harsh. Partial disability frequently precedes total disability. Thus, some claimants who ultimately will become totally disabled could maintain a claim for their partial disability before the 12-month period expires.

238. N.M. STAT. ANN. §§ 52-3-1 to -59 (1978 & Supp. 1984).

poisoning by benzol . . . or any other disease . . . must be filed within one year of the beginning of disablement of the employee."[239] This provision is further limited by section 52-3-10(A)(2) which requires that the silicosis or asbestosis claimant must have worked, during the ten years preceding disablement, 1250 work shifts (approximately five to six years) while being exposed to the harmful dust.[240]

The concept of estoppel was used to block a minimum exposure rule defense in New Mexico. In *McDonald v. Kerr-McGee Corp.*,[241] the company relied on section 52-3-10(A)(2) to deny a miner's claim for compensation for silicosis. The court ruled, however, that the company could be estopped from raising the minimum exposure rule of this section as a defense because when the claimant was originally hired, Kerr-McGee allegedly failed to notify him that he was already suffering from pneumoconiosis, even though his pre-employment examination x-ray had revealed that condition to the company. The court remanded the case to the district court to determine whether the defendant's concealment of known facts had induced the claimant's reliance and his subsequent act of accepting the dangerous employment.

Last Employment Rules

At least four states have limitation periods running specifically from the time of last employment. In this subsection provisions of the Montana, Pennsylvania, South Dakota, and Utah statutes will be discussed.

Montana

Montana's Occupational Disease Act[242] allows the claimant to file one year "from the date the claimant knew or should have known that his total disability resulted from an occupational disease."[243] If the claimant "could not have known that the claimant's condition . . . was related to an occupational disease," the period can be extended two additional years.[244] In no event, however, may a claim "be maintained unless the claim is properly filed within three years after the last day upon which the claimant . . . actually worked for the employer against whom compensation is claimed."[245] This provision would permit recovery by a claimant who was transferred to a nonhazardous occupation within the

239. *Id.* § 52-3-42(A) (1978).
240. *Id.* § 52-3-10(A)(2).
241. 93 N.M. 192, 598 P.2d 654 (1979).
242. MONT. CODE ANN. § 39-72-101 to -714 (1983).
243. *Id.* § 39-72-403(1).
244. *Id.* § 39-72-403(2).
245. *Id.* § 39-72-403(3).

same employment and who became disabled within three years of leaving his employer. Thus, a claimant who, like Bunker, was transferred after twenty-two months of exposure to asbestos dust within the company, but, unlike Bunker, remained with the employer in a nonhazardous environment, would be eligible for total disability benefits under this Montana last employment rule even though he would have lost under a last exposure rule.

Pennsylvania

The Pennsylvania Occupational Diseases Act[246] contains a host of timing provisions governing the filing of claims and notification to the employer. The Pennsylvania limitation provisions are complex, and only the general features are highlighted here. Section 1401(c) limits compensation to compensable disabilities "occurring within four years after the date of . . . last employment in such occupation or industry."[247] In *Ryden v. Johns-Manville Products*,[248] the court ruled that a compensable disability requires a reduction of the claimant's earning capacity.[249] Therefore, a compensable disability under this subsection alone cannot occur prior to the manifestation of disability,[250] although presumably it could occur upon the manifestation of symptoms that result in less than total disablement. Section 1401(e), however, bars compensation "for partial disability due to silicosis, anthraco-silicosis, coal worker's pneumoconiosis, or asbestosis."[251] Thus, an asbestosis victim who is less than totally disabled four years after leaving either the job or industry in which the hazard was encountered is barred from recovery.[252] Section 1401(d) requires the dust disease claimants to show an "aggregate employment of at least two years in the Commonwealth of Pennsylvania,

246. PA. STAT. ANN. tit. 77, §§ 1201-1603 (Purdon 1952 & Supp. 1984-1985). In Pennsylvania, occupational disease benefits can also be awarded under the Workmen's Compensation Act. *Id.* tit. 77, §§ 1-1066. Under this Act, the disability must occur within 300 weeks after last exposure. *Id.* § 302(2).

247. *Id.* § 1401(c) (Supp. 1984-1985).

248. 518 F. Supp. 311 (W.D. Pa. 1981).

249. *Id.* at 323.

250. *I.e.*, a reduction in wages because of health impairment.

251. PA. STAT. ANN. tit. 77, § 1401(e) (Supp. 1984-1985).

252. In Pennsylvania, the date when an occupational disease victim becomes totally disabled is a matter that "must be determined independently on the facts of each case." Jones & Laughlin Steel Corp. v. Workmen's Compensation Comm'n Appeal Bd., 35 Pa. Commw. 58, 60, 384 A.2d 1046, 1048 (1978) (citing Novak v. Mathies Coal Co., 29 Pa. Commw. 122, 370 A.2d 435 (1977)). The court held that neither the date of final exposure nor the date of diagnosis was automatically dispositive of the issue. *Id.* For a discussion of when the Pennsylvania tort statute for personal injury begins to run in dust disease cases, see Grabowski v. Turner & Newall, 516 F. Supp. 114 (E.D. Pa. 1980).

during a period of ten years next preceding the date of disability, in an occupation having a silica, coal, or asbestos hazard."[253] Each of these sub-sections would be sufficient to bar a claimant like Bunker in Pennsylvania.

Another Pennsylvania limitation requires either that the parties agree on compensation, or that a petition be filed, within sixteen months after compensable disability begins.[254] The employer must receive notice of the disability within twenty-one days after compensable disability begins, or "no compensation shall be due until such notice be given;" if notice is not given within 120 days, "no compensation shall be allowed."[255]

If dust disease claimants are barred under any timing provision of the Pennsylvania statute, they need not go away entirely empty-handed. Section 1401(i) provides benefits of seventy-five dollars per month to every totally disabled employee who has not "been compensated because his claim was barred by any of the time limitations prescribed by this act."[256] To qualify for the special compensation, the claimant must have been exposed to the dust for two years within Pennsylvania, and after 1969 the claimant must be a Pennsylvania resident.[257]

South Dakota

An occupational disease claimant in South Dakota has two years from the time of disability to bring a claim.[258] A silicosis victim, however, must have a minimum of two years exposure to silica dust under a contract of employment.[259] In addition, the statute has notice provisions requiring all disease claimants, except radiation victims, to give written notice of disease contraction within six months of leaving the employ-

253. PA. STAT. ANN. tit. 77, § 1401(d) (Supp. 1984-1985).

254. *Id.* § 1415.

255. *Id.* § 1411.

256. *Id.* § 1401(i).

257. *Id.* The Pennsylvania limitations and their interactions are complex.

258. S.D. CODIFIED LAWS ANN. § 62-8-11 (1978).

259. *Id.* § 62-8-14. An earlier version of this provision required a five year exposure *out of the 10 years preceding disablement* the last two of which were required to be in South Dakota, 1947 S.D. Sess. Laws ch. 426. Under the former statute, a miner who received far more than five years exposure during his working life could still be barred if at least five full years of that exposure did not take place within the decade adjacent to his disablement. *See* Carr v. Homestake Mining Co., 88 S.D. 27, 215 N.W.2d 830 (1974). Carr received no compensation although he was exposed to silica dust for over 25 years in South Dakota; only a little over a year of exposure occurred in the decade preceding disablement. Under the current statute, the claimant in *Carr* could recover, but a *Bunker*-type claimant with less than two years total exposure could not.

ment.[260] Presumably notice may be given before disability occurs, but some manifestation of disease symptoms would appear to be necessary,[261] a requirement that might effectively bar claimants like Bunker from recovery in South Dakota.

Utah

Section 35-2-48 of the Utah Occupational Disease Disability Compensation Act[262] bars claims brought more than one year after "the cause of action arises."[263] The section provides that "[t]he cause of action shall be deemed to arise on the date the employee first suffered incapacity from the occupational disease and knew, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by his employment."[264] This discovery rule, however, is subject to a further limitation found in section 35-2-13. This section states that "[n]o compensation shall be paid for a disease other than silicosis unless total disability results within one year from the last day upon which the employee actually worked for the employer against whom compensation is claimed."[265] Silicosis victims' claims for total disability must be brought within three years of such last employment, although silicosis victims whose disease is complicated by active tuberculosis are given five years.[266] Compensation for silicosis is subject, however, to a further minimum exposure rule requiring that the claimants have been exposed to silicon dioxide dust for a total of five years in the state out of the fifteen years preceding disability.[267]

One might surmise from the above provisions that Utah employees who suspect they have an occupational disease will be motivated to remain in injurious employment until they become totally disabled lest the one year from last employment limitation should run against them. Section 35-2-56, however, provides for partial compensation to an employee who is deemed by an appointed "impartial medical panel" to be partially disabled.[268] In addition, this section provides funds for some of the employee's vocational rehabilitation.[269] This compensation for partial disa-

260. S.D. CODIFIED LAWS ANN. §§ 62-8-29 to -30 (1978).
261. Presumably, one cannot give notice without presenting some evidence of incipient disease.
262. UTAH CODE ANN. §§ 35-2-1 to -65 (1953 & Supp. 1983).
263. *Id.* § 35-2-48(a) (1953).
264. *Id.* § 35-2-48(c).
265. *Id.* § 35-2-13(a)(2).
266. *Id.* § 35-2-13(a)(3).
267. *Id.* § 35-2-13(b)(2).
268. *Id.* § 35-2-56 (Supp. 1983).
269. *Id.* § 35-2-56(2).

bility, however, requires the claimant to have been exposed to the deleterious substance within two years of the disablement.[270]

Bars to Retroactive Application of New Statute

Even though a state legislature enacts a more liberal provision, the courts may decline to apply the more favorable statute to a disabled claimant whose exposure to the occupational disease hazard took place before the amendment was passed. For example, prior to September 1975 the Colorado Occupational Disease Disability Act[271] included a minimum exposure rule[272] and a last exposure rule.[273] Claimants were barred if they had not been exposed within the state, or under Colorado contracts of employment, to asbestos, silica, or coal dust during five of the ten years preceding their disablements.[274] They also were barred if they were not disabled within "five years from the date of the last injurious exposure to such disease while actually working for the employer against whom compensation is claimed."[275]

The constitutionality of the five year minimum exposure rule for dust diseases was attacked in *Stevenson v. Industrial Commission*.[276] The claimant argued that the statute created an "arbitrary, unreasonable and discriminatory" classification, thus denying him due process and equal protection under both the Colorado and United States Constitutions.[277] The Colorado Supreme Court agreed that the rule invidiously classified disabled workers into two classes: those exposed for five years or more and those exposed for less. The court found that the purported rational basis for the classification was inadequate;[278] five years of exposure to harmful dusts was not necessary to establish a causal connection between the exposure and the subsequent disease.[279]

270. *Id.* § 35-3-56(1)(b).

271. COLO. REV. STAT. §§ 8-60-101 to -131 (1973 & Supp. 1983).

272. *Id.* § 8-60-110(g) (1973) (repealed 1975).

273. *Id.* § 8-60-110(d), (e) (1973) (repealed 1975).

274. *See supra* note 272.

275. COLO. REV. STAT. § 8-60-110(e) (1973) (repealed 1975).

276. 190 Colo. 234, 545 P.2d 712 (1976).

277. *Id.* at 235, 545 P.2d at 714. He also argued that the Colorado residence requirement impinged on his constitutional right to travel. *Id.*

278. *Id.* at 238, 545 P.2d at 715-16. The classification bore "no reasonable relation to a legitimate state objective." *Id.* at 238, 545 P.2d at 716.

279. In a conclusion similar to that reached by the Indiana Court of Appeals in *Bunker*, *see supra* notes 72-75 & accompanying text, the court concurred with the trial court "that the duration of exposure to hazardous quantities of silica dust required to induce disabling silicosis can vary from six months to ten or even twenty years." 190 Colo. at 238, 545 P.2d at 716.

In the court's view, those disease victims with less than five years exposure should be given the opportunity to show the causal connection. "The denial of a hearing to such appli-

The Colorado legislature replaced both exposure rules with a disability accrual statute effective September 1975.[280] In March 1978, James Stark filed a claim seeking compensation under the Colorado Occupational Disease Act.[281] Stark was last exposed to silica dust in 1960. In 1972 he was diagnosed as having silicosis, at which time he was ruled to have become disabled.[282] The referee denied the claim, citing the last exposure rule of the earlier statute. Stark attacked the last exposure portion of the statute on constitutional grounds similar to those argued successfully in *Stevenson*. The Colorado Court of Appeals, however, upheld the rule, stating that "the limitation operates in the same manner on all members of the class"[283] and that "barring claims when disablement does not occur within five years of the last exposure bears a reasonable relationship" to the end of "preventing stale claims."[284]

Although Stark had argued in the alternative that the repeal of the statute removed it "from consideration by the Commission,"[285] the court of appeals held that the rights and liabilities of the parties had become fixed and vested in 1965 when five years had run from the time of Stark's last exposure to silica dust. Therefore, to apply the new provisions to this case would impermissibly allow the repeal to operate retroactively and would "impair the employer's right to rely upon the prior statute as a defense."[286] The clear implication of the court's holding is that whether Stark was disabled before or after the effective date of the repeal was irrelevant. The court relied on a vested rights concept to resolve the controlling law question in favor of the law in effect when the statute of limitations has run.[287]

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cants is a denial of due process; the denial of benefits to a class of workers indistinguishable on the basis of relevant considerations from a class of workers who are granted benefits denies them equal protection of the law." *Id.* at 238, 545 P.2d at 716 (quoting trial court quoting Stanley v. Illinois, 405 U.S. 645 (1972)).

280. COLO. REV. STAT. § 8-52-105 (1975).

281. Stark v. Zimmerman, 638 P.2d 843 (Colo. Ct. App. 1981).

282. *Id.* at 846 (Berman, J., dissenting).

283. *Id.* at 845.

284. *Id.* In dissent, Judge Berman held that the *Stevenson* rationale was directly applicable to the last exposure rule. *Id.* at 846-47 (Berman, J., dissenting).

285. *Id.* at 845.

286. *Id.* at 845-46.

287. This holding is opposed to that reached by the North Carolina Supreme Court in Wood v. J. P. Stevens Co., 297 N.C. 636, 256 S.E.2d 692 (1979); *see supra* notes 202-15 & accompanying text.

A result similar to that reached by the Colorado court in *Stark* was accomplished legislatively in New Jersey. In enacting a new discovery rule for occupational diseases, the legislature expressly provided that it was not to apply retroactively, but only to claimants whose exposure to hazards had ended after January 1, 1980. Delayed manifestation diseases such as

Effective Date Limitations

Fourteen states have placed a limit on liability, usually by using as a starting point for coverage the date the state's occupational disease law was enacted.[288] Generally, claims are not compensable in these states unless the worker's last exposure occurred after the effective date. Ten of the fourteen states which have these limits established them in the 1940's.[289]

Although some occupational diseases develop over very long periods, today very few new claimants fall outside these deadlines. For the great majority of exposed workers, either their last exposure post-dates the late 1940's, or they have already developed any occupational disease which is likely to become manifest. The prototype, Bunker, whose disease was diagnosed in 1976, comes close to being affected by these cutoff dates: although not diagnosed until 1976, his exposure began in February 1949 and continued for twenty two months. A claimant like Bunker, however, would be barred by this effective date limitation in three states: Montana (1959),[290] Oklahoma (1953),[291] and Kansas (1953).[292]

Statutes Which Permit the *Bunker*-type Claimant to Recover

Disability, Injury, or Discovery of Disease Rules

The majority of states now provide for some form of discovery rule to begin the running of their limitation periods. The more restrictive of these rules begin the period when claimants know, or should know, that they are diseased. Because knowledge of the relation of the disease to

asbestosis, however, were exempted from the retrospective bar. *See infra* notes 321-24 & accompanying text.

288. GA. CODE ANN. § 34-9-287 (1982); IOWA CODE ANN. § 35A7(6) (West Supp. 1983); KAN. STAT. ANN. § 44.5a20 (1980); ME. REV. STAT. ANN. tit. 39, § 182 (1964); MONT. CODE ANN. § 39-72-406(1) (1983); NEV. REV. STAT. § 617.170 (1979); N.H. REV. STAT. ANN. § 281:2 (West Supp. 1983); N.M. STAT. ANN. § 52-3-10 (Supp. 1982); N.C. GEN. STAT. § 97-56 (1979); OHIO REV. CODE ANN. § 4123.68 (Page 1980); OKLA. STAT. ANN. tit. 85, § 1.1 (West Supp. 1983-1984); S.D. CODIFIED LAWS ANN. § 62-8-5 (Supp. 1982); TEX. STAT. ANN. art. 8306, § 23 (Vernon 1967); UTAH CODE ANN. § 35-2-13-(1) (1977).

289. Georgia (Apr. 30, 1946); Iowa (Oct. 1, 1947); Maine (Jan. 1, 1946); Nevada (1947); New Hampshire (Aug. 31, 1947); New Mexico (Apr. 9, 1945); Ohio (Oct. 12, 1945); South Dakota (July 1, 1947); Texas (1947); Utah (July 1, 1941).

An additional state, North Carolina, set its date in 1935. N.C. GEN. STAT. § 97-56 (1979).

290. MONT. CODE ANN. § 39-72-406(1) (1983) (no recovery when last day of injurious exposure occurred prior to July 1, 1959). Minor exceptions are listed *id.* § 39-72-405(3).

291. OKLA. STAT. ANN. tit. 85, § 1.1 (West 1970 & Supp. 1984-1985) (no recovery when last injurious exposure occurred before June 6, 1953).

292. KAN. STAT. ANN. § 44.5a20 (1980) (no compensation if last exposure occurred prior to July 1, 1953).

employment is not required to begin these limitation periods, those workers whose diagnosis of the disease precedes their knowledge of its occupational cause will be barred if they fail to acquire that knowledge before the statutory period has run. A plaintiff like Bunker presumably would recover under such a rule because Bunker's knowledge of the occupational relationship coincided with the diagnosis of his disease as asbestosis. Inasmuch as a number of diseases, such as asbestosis, are specifically related to occupational exposure, this simultaneity of diagnosis and knowledge of at least partial occupational causation is likely in many industrial cases. Limitation periods that commence from date of disability, or the date of injury (where injury is defined as disablement), are subject to the same shortcoming: workers may become disabled, yet be unaware that their disablement is employment related.

Colorado, Connecticut, Florida, Kentucky, Massachusetts, Mississippi, Nebraska, Ohio, South Dakota, and Texas are states that have an injury or disability accrual.[293] The date of disability or injury has sometimes been liberally construed.[294] For example, under the Ohio statute the date of diagnosis by a physician is an alternative to the date of disability to trigger that state's limitation period.[295] The statute requires a claimant to file within two years after disability or within six months after diagnosis.

Connecticut

Connecticut, on the other hand, has a fairly strict disability statute. A claimant is required to give notice within three years from the first

293. CONN. GEN. STAT. § 31-294 (1972); FLA. STAT. ANN. § 440.19 (1981); KY. REV. STAT. § 342.316 (1983); MASS. GEN. LAWS ANN. ch. 152, § 41 (West 1976); MISS. CODE ANN. § 71-3-35 (1972); NEB. REV. STAT. § 48-137 (1978); OHIO REV. CODE ANN. § 4123.85 (1980); S.D. CODIFIED LAWS ANN. § 62-8-29 (1978); TEX. STAT. ANN. art. 8307, § 4a (Vernon Supp. 1984).

South Dakota has a notice requirement that might bar *Bunker*- type claimants. *See supra* notes 258-61 & accompanying text.

Colorado now has a disability accrual statute, COLO. REV. STAT. § 8-52-105 (1973), but under Stark v. Zimmerman, 638 P.2d 843 (Colo. Ct. App. 1981), this provision would not apply to the *Bunker*-type claimant. *See supra* notes 280-87 & accompanying text.

Massachusetts permits employees to preserve their common-law tort rights against employers for personal injury, MASS GEN. LAWS ANN. ch. 153, § 1 (West 1958), but employees will be held to have waived such rights if they are not preserved in writing at the time of contract for hire. *Id.* ch. 152, § 24.

294. *See, e.g.*, Richmond v. Industrial Comm'n, 533 P.2d 931 (Colo. Ct. App. 1975); Richmond v. Industrial Comm'n, 33 Colo. App. 21, 513 P.2d 1088 (1973); Moore's Case, 362 Mass. 876, 289 N.E.2d 862 (1972); Trombetta's Case, 1 Mass. App. Ct. 102, 294 N.E.2d 484 (1973).

295. OHIO REV. CODE ANN. § 4123.85 (1980).

manifestation of a symptom of an occupational disease.[296] Because many occupational diseases, such as asbestosis and silicosis, develop over a long period of time, many workers are likely to manifest a symptom long before the condition becomes severe enough to motivate them to seek medical help. Moreover, a plaintiff who sought immediate medical assistance but lacked knowledge of occupational relationship could be barred by Connecticut's statute. The statute certainly bars claims of people who are initially misdiagnosed.[297]

Nebraska

The Nebraska statute requires that claims for personal injury be brought "within two years after the accident."[298] This statutory language was interpreted in *Osteen v. A.C. & S., Inc.*[299] In *Osteen*, the employee had been last exposed to asbestos in 1974-1975 and entered the hospital for diagnosis on February 1, 1977. The court found that the earliest date upon which "the disease manifested itself in disability was February 1, 1977. Using that 'date of injury,' it is plain that claimant gave notice and filed her petition within the statutory time limits."[300]

Wisconsin

In Wisconsin a recent amendment extended the limitation from six to twelve years from the date of injury. The twelve-year limit does not cut off rights to recovery; it merely provides for payment from a different source, the Work Injury Supplemental Benefit Fund.[301]

Occupational Relationship Rules

In many of the discovery rule states, the limitation period, at least for some diseases, is counted from the time that the claimant knows both

296. CONN. GEN. STAT. § 31-294 (1972); *see also* TEX. STAT. ANN. art. 8307, § 4a (Vernon Supp. 1984) The statute provides that a claimant must give notice within 30 days after the first distinct manifestation of an occupational disease and claim compensation within one year thereof. The Board, however, can waive these limitations for meritorious cases.

297. Compare the case of the Arkansas claimant, Clayton Hamilton, *supra* notes 92-105 & accompanying text.

298. NEB. REV. STAT. § 48-137 (1978).

299. 209 Neb. 282, 307 N.W.2d 514 (1981).

300. *Id.* at 286, 307 N.W.2d at 518. The court also affirmed that in Nebraska peritoneal mesothelioma was an occupational disease. The incidence of this disease in the population at large is negligible, "but approaches 7 percent in asbestos workers . . . . Conversely, several studies which traced the employment history of men who had died of mesothelioma found that between 60 percent and 80 percent . . . had a history of prolonged exposure to asbestos in their employment." *Id.*

301. WISC. STAT. § 102.17(4) (West 1973 & Supp. 1983-1984).

the nature of the disability and its relation to employment. By far, the largest number of states—twenty-two—fall into this category.[302] Occupational relationship rules represent the legislative trend as states revise their worker compensation statutes.[303]

Among the states that have occupational relationship statutes, there is considerable variation in the timing for giving notice or for filing a claim.[304] The periods range from thirty or ninety days[305] to three years[306] after discovery that the disease is occupationally related. A claimant like Bunker, of course, would have a great advantage under this type of statute, for it allows compensation even if the employee does not discover the true nature of the disease, or that it is employment-related, until twenty years or more after termination of exposure or employment.

Tennessee

In some states, however, the more liberal discovery rule results from judicial interpretation rather than statutory enactment.[307] Tennessee courts have interpreted their statute in such a manner. The Tennessee statute requires that notice be given to the employer within thirty days after the first distinct manifestation of an occupational disease.[308] The

302. The states with this liberal discovery rule are Alaska, Arizona, California, Delaware, Hawaii, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Virginia, West Virginia, Washington, and Wisconsin. ALASKA STAT. § 23.30.105 (1981); ARIZ. REV. STAT. ANN. § 23-1061 (1983); CAL. LAB. CODE § 5412 (West 1971); DEL. CODE ANN. tit. 19, § 2361(c) (1974); HAWAII REV. STAT. § 386-82 (1976); LA. REV. STAT. ANN. § 23:1031.1 (1964 & Supp. 1984); MD. ANN. CODE art. 101, § 26 (1957 & Supp. 1984); MICH. COMP. LAWS § 418.441 (1967 & Supp. 1984-1985); MINN. STAT. ANN. § 176.151 (West 1966 & Supp. 1984); MO. ANN. STAT. § 287.430 (Vernon Supp. 1984); N.H. REV. STAT. ANN. tit. 281, § 16-a (West Supp. 1983); N.J. STAT. ANN. § 34:15-34 (West 1959 & Supp. 1984-1985); N.Y. WORK. COMP. LAW § 44-a (McKinney 1965 & Supp. 1983-1984); N.D. CENT. CODE § 65-05-01 (1960 & Supp. 1983); OKLA. STAT. ANN. tit. 85, § 24 (West 1970 & Supp. 1983-1984); OR. REV. STAT. § 656.807 (1981); R.I. GEN. LAWS § 28-35-57 (1979 & Supp. 1984); TENN. CODE ANN. § 50-6-305 (1983 & Supp. 1984); VA. CODE § 65.1-52 (1950 & Supp. 1984); WASH. REV. CODE ANN. § 51.28.055 (1962 & Supp. 1984-1985); W. VA. CODE § 23-4-15 (1981); WIS. STAT. § 102.12 (1973).

303. P. BARTH & H. HUNT, *supra* note 3, at 120, 124; Note, *Issues*, *supra* note 4.

304. *See, e.g.*, ALASKA STAT. § 23.30.105 (1981) (two years); CAL. LAB. CODE § 5412 (West 1971) (one year); LA. REV. STAT. ANN § 23:1031.1 (West 1964) (six months); MO. REV. STAT. § 287.430 (1978) (two years unless employer fails to file a report of injury or death, in which case employee has three years).

305. *See, e.g.*, OKLA. STAT. tit. 85, § 24 (1970) (90 days); TENN. CODE ANN. § 50-6-305 (1983) (30 days to give notice to the employer).

306. R.I. GEN. LAWS § 28-35-57 (1956).

307. *See, e.g.*, Myers v. Rival Mfg. Co., 442 S.W.2d 138 (Mo. Ct. App. 1969); McKee v. Crescent Spinning Co., 54 N.C. App. 558, 284 S.E.2d 175 (1981); Consolidated Coal Co. v. Brown, 225 Tenn. 572, 474 S.W.2d 416 (1971).

308. TENN. CODE ANN. § 50-6-503 (1983).

courts have held, however, that failure to give such notice is excusable[309] and that the running of the period is postponed until the employee has actual or constructive knowledge that the disability is employment-related.[310]

Minnesota

One of the first states to enact an occupational-relationship rule, Minnesota, did so in response to a case in which the claimant unsuccessfully presented arguments similar to Bunker's. Prior to 1973, Minnesota employees were barred from bringing claims twelve months after contracting a disease due to a hazardous employment if they had not yet become disabled.[311] In addition, asbestosis or silicosis claimants were subject to a presumption, rebuttable by "conclusive evidence," that their diseases were not occupationally related if they had not been exposed to the hazards of the diseases for five of the ten years preceding disablement.[312]

In *Graber v. Peter Lametti Construction Co.*,[313] the Minnesota Supreme Court considered whether the three-year last-exposure provision was constitutional in the case of silicosis. The claimant, like Richard Bunker, argued that the provision denied him equal protection of the laws because his exposure to silica dust ended in 1964, but his disease was neither diagnosed, nor was he disabled, until 1968. The court found a rational basis for upholding the statute because, with the passage of time, "evidence of causal relationship of the hazard to the disease may become stale for both the employee and employer."[314] Nevertheless, the *Graber* court, noting that medical knowledge about the latency of silicosis had advanced since the three-year limitation was established in 1949, urged the legislature to reform the provision by balancing the legitimate interests involved.[315] One year later the Minnesota legislature enacted legislation requiring only that occupational disease claimants give notice

309. *See, e.g.,* Christopher v. Consolidated Coal Co., 222 Tenn. 727, 440 S.W.2d 281 (1969).

310. *See, e.g.,* Consolidated Coal Co. v. Brown, 225 Tenn. 572, 474 S.W.2d 416 (1971).

311. MINN. STAT. § 176.151(7) (1972).

312. *Id.* § 176.151 (1966). Three years of exposure had to occur within the state. *Id.*

313. 293 Minn. 24, 197 N.W.2d 443 (1971).

314. *Id.* at 30, 197 N.W.2d at 447.

315. The court suggested a return to the pre-1949 silicosis/asbestosis limitation period which ran from the time "such disease was contracted," MINN. STAT. § 176.66(32) (1943), rather than from last exposure. 293 Minn. at 30, 197 N.W.2d at 447. The supreme court had decided in an earlier case that a disease is contracted only when clinical symptoms emerge, even if the symptoms manifest after employment has terminated. Yeager v. Delano Granite Works, 236 Minn. 128, 52 N.W.2d 116 (1952).

"within three years after the employee has knowledge of the cause of such injury and the injury has resulted in disability."[316]

Missouri

A variation on the employment-related discovery accrual is found in Missouri's statute, which provides that a claimant must file within two years after it becomes "reasonably discoverable and apparent that a compensable injury has been sustained."[317] Knowledge that the injury is compensable, however, requires knowing the nature of the injury and its relationship to the employment.[318] This interpretation was refined further in *Moore v. Carter* when the court held that a claimant's mere awareness of the presence of a work-related illness did not constitute knowledge that she had a compensable injury.[319] Thus, the claimant, who in 1972 knew that she had pulmonary edema and in 1974 learned that it was work-related, was not barred from filing a claim in 1977 because she did not learn until 1976 that the edema was fully job-related and compensable.[320]

New Jersey

New Jersey adopted a discovery rule in 1980.[321] By statute, it may not be applied retroactively.[322] Employees whose exposure ended before January 1980 are covered by the prior statute, a last exposure rule. The prior statute, however, does not apply to diseases that are enumerated in the statute:[323] asbestosis, silicosis, and "any occupational disease having the same characteristics of the . . . enumerated diseases."[324]

316. MINN. STAT. ANN. § 176.151(4) (West. Supp. 1984).

317. MO. REV. STAT. § 287.430 (1978).

318. *See, e.g.*, Myers v. Rival Mfg. Co., 442 S.W.2d 138, 141 (Mo. Ct. App. 1969).

319. 628 S.W.2d 936, 941 (Mo. Ct. App. 1982) (citing Myers v. Rival Mfg. Co., 442 S.W.2d 138).

320. The claimant was employed for one year working on carburetors which exposed her to emery dust and occasionally to gasoline fumes. During the next three years, she worked near employees who checked carburetors with gasoline and thus was exposed to fumes. The following three years she experienced some fume exposure as an inspector, and finally, she worked three to eight weeks in the flow test department which continuously exposed her to gasoline fumes. She was hospitalized in September 1972, for acute pulmonary edema of undetermined etiology. *Id.* at 937-38. The claimant testified that her personal physician told her in 1974 that her condition was caused by gasoline fumes. The court, however, deferred to a finding by the Commission that her illness was not "factually diagnosed as fully job-related and compensable" until a specialist in chest diseases diagnosed it in April 1977, over one year after she had filed her claim. *Id.* at 940-41.

321. N.J. STAT. ANN. § 34:15-34(a) (West Supp. 1984-1985).

322. *See id.*

323. *Id.*

324. *Id.* If the employee's disease does not fall within these exceptions, then she or he

New York

New York has an occupational relationship rule only for certain enumerated diseases. Section 28 of the Workers' Compensation Law requires a claimant to file "within two years after the accident, or if death results therefrom within two years after such death."[325] This section is tolled in the case of compressed air illnesses and occupational diseases resulting from exposure to benzol, certain metallic chemical elements, and radiation, until such time as the claimant is disabled and knows "that the disease is or was due to the nature of the employment."[326] When claimants are disabled and have the requisite knowledge that the employment is related to their illnesses, then they have ninety days to file a claim.[327]

In addition, section 44a provides a special discovery rule for victims of "silicosis or other dust diseases."[328] Claimants with these diseases must file within ninety days after the claimant becomes disabled and has knowledge of the relationship of the disease to employment. The employer "in whose employment an employee was last exposed to an injurious dust hazard" will then be liable for the payments.[329]

Section 44a would apply to the *Bunker*-type claimant because asbestosis is caused by exposure to asbestos dust.[330] New York courts have repeatedly ruled that section 44a is limited to dust diseases within the pneumoconiosis group, and asbestosis seems clearly within this classification even though few, if any, New York cases have ruled specifically on asbestosis under section 44a.[331]

Asbestos, however, has also been closely linked with a form of cancer called mesothelioma.[332] Often a person suffering from asbestosis

must file within one year after discovering the disability is employment-related, but within five years of last exposure.

Kentucky and Wyoming also have retained their last exposure rules as alternative trigger dates. *See infra* note 346.

325. N.Y. WORK. COMP. LAW § 28 (McKinney 1965 & Supp. 1983-1984).

326. *Id.*

327. *Id.*

328. N.Y. WORK. COMP. LAW § 44a (McKinney 1965).

329. *Id.*

330. Asbestosis is caused by inhalation of asbestos fibers which scars air sacs in the lung tissue. I. SELIKOFF & D. LEE, ASBESTOS AND DISEASE 143-56 (1978); Special Project, *supra* note 9, at 573 n.10.

331. *See, e.g.*, Smith v. Certain Teed Prods. Corp., 85 A.D.2d 820, 445 N.Y.S.2d 649 (1981); Roberts v. Agway, Inc., 71 A.D.2d 733, 419 N.Y.S.2d 767 (1979); Lawton v. Port of New York Auth., 276 A.D. 81, 92 N.Y.S.2d 714 (1949).

332. Mesothelioma, which is cancer of the membrane lining of the lungs, chest, or abdominal cavities, is not entirely peculiar to asbestos exposure. It has been estimated that 15-80% of people with mesothelioma have had no documented contact with asbestos. Note, *Issues, supra*

later develops mesothelioma. Sometimes asbestosis fails to manifest itself, and the initial disablement occurs from the mesothelioma.[333] If the *Bunker*-type claimants suffer from this disease rather than asbestosis, their suits are likely to be barred.[334]

If the claimant's disease is not among the enumerated exceptions tolled under sections 28 or 44a, the claim would be governed by a second limitation found in section 40, which runs backwards in time from the date of disablement: with certain additional exceptions beyond those enumerated in section 28,[335] no more than twelve months can have elapsed between the time of disablement and the time of disease contraction.[336] The disease must also have been due "to the nature of [the claimant's] employment and contracted therein, or in a continuous employment similar to the one in which he was engaged at the time of his disablement, whether under one or more employers."[337] A claimant who is disabled while still employed in the job in which he contracted the disease is not subject to the twelve-month limitation. But a claimant who is no longer in the hazardous employment when he becomes disabled in 1976 could be barred under the twelve month limitation.

In applying the twelve-month limitation period, the New York Workers' Compensation Board has been given considerable latitude by the courts to establish the date of disease contraction and the date of disablement. A person who has left the hazardous employment can be deemed to have been disabled at the time "the nature of the disease was diagnosed" or "before diagnosis but after leaving employment."[338] Simi-

note 4, at 874-75 & n.29. In general, the closer the check for asbestos, the higher the correlation. *Id.* at n.9 (citing Kannerstein, Churg & Selikoff, *Pathogenic Effects of Asbestos*, 101 ARCHIVES PATHOLOGY & LABORATORY MED. 623, 625 (1977); *see also supra* note 300.

333. *See, e.g.*, Smith v. Certain Teed Prods., 85 A.D.2d 820, 445 N.Y.S.2d 649 (1981).

334. In *Smith v. Certain Teed Prods.*, mesothelioma was found not to be a dust disease within § 44a. *Id.*

335. N.Y. WORK. COMP. LAW § 40(1) (McKinney Supp. 1983-1984) provides:

> Nor shall it bar compensation in the case of an employee who contracted compressed air illness, or its sequelae, or whose disablement or death is or was caused by latent or delayed pathological bone, blood or lung changes or malignancies due to occupational exposure to or contact with arsenic, benzol, beryllium, zirconium, cadmium, chrome, lead or flourine.

N.Y. WORK. COMP. LAW § 40(2) (McKinney Supp. 1983-1984) provides:

> Notwithstanding any other provision of this chapter to the contrary, the time limit for contraction of the disease and for disablement or death resulting therefrom as prescribed by this section shall not bar compensation in the case of an employee whose disablement or death is or was caused by occupational exposure to or contact with x-rays, radium, ionizing radiation or radio-active substances.

336. N.Y. WORK. COMP. LAW § 40(1) (McKinney Supp. 1983-1984).

337. *Id.*

338. Garafolo v. Arms Hills Supermarkets, 74 A.D.2d 681, 682, 424 N.Y.S.2d 784, 785

larly, the courts have ruled that an "[a]ggravation in a claimant's last employment is the equivalent of contraction as that word is construed in section 40 of the Workers' Compensation Law."[339] Therefore, the latest date that the Board could designate the date of contraction is the day the employee left the employment in which he experienced the exposure to the hazard. Thus, the *Bunker*-type claimant would be deemed to have contracted asbestosis no later than 1960, and because he was first diagnosed as having the disease in 1976, the New York Board would have had no grounds to set his disablement any earlier than 1976 because his earning ability suffered no impairment prior to that date.[340] Bunker's claim would have been barred because more than twelve months elapsed between these dates.

In *Smith v. Certain Teed Products Corp.*,[341] the claimant had left the hazardous employment in 1972 and became disabled in 1975. In late 1974 he learned that he was suffering from mesothelioma and died from the disease shortly after. Applying the twelve-month limitation period of section 40, the Workers' Compensation Board and the court disallowed his claims for disability and death on the ground that mesothelioma was not a dust disease within the meaning of section 44a.[342] Although *Bunker*-type claimants apparently can recover for disability due to asbestosis in New York, they will be barred if their occupational exposure results in the dreaded asbestos-related cancer.

Virginia

The Virginia statute provides that claims must be filed within five years of the last exposure, or within two years "after diagnosis has been communicated to the employee," whichever occurs first.[343] Several diseases, including mesothelioma, are exempted from this limitation.[344]

(1980); Artman v. Saperstein's Bake Shop, Inc., 37 A.D.2d 651, 652, 322 N.Y.S.2d 334, 336 (1971).

339. *See, e.g., Garafolo*, 74 A.D.2d at 682, 424 N.Y.S.2d at 785 (citing McCann v. City of New York, 27 A.D.2d 618, 619, 275 N.Y.S.2d 733, 735 (1966)).

340. *See, e.g.*, Zambrona v. Renell Bake Shop, Inc., 34 A.D.2d 707, 309 N.Y.S.2d 758 (1970); Ryciad v. Eastern Precision Resistor, 12 N.Y.2d 29, 334 N.Y.S.2d 207, 186 N.E.2d 408 (1962).

341. 85 A.D.2d 820, 445 N.Y.S.2d 649 (1981).

342. *Id.* at 821, 445 N.Y.S.2d at 651.

343. VA. CODE § 65.1-52(3) (Supp. 1984). Note that the limitation period for coal miners' pneumoconiosis is three years from last exposure. *Id.* § 65.1-52(1). The limitation period for byssinosis is seven years from last exposure. *Id.* § 65.1-52(2).

344. The diseases exempted include: cataract of eyes due to exposure to heat or glare of molten glass or radiant rays, epitheliomatous cancer, radium disability or disability due to radiation exposure, ulceration due to chrome compounds or to caustic chemical acids, and angiosarcoma of the liver due to exposure to vinyl chloride. *Id.* § 65.1-52(3).

Thus, the situation in Virginia was opposite to that in New York because latent asbestosis victims were barred from recovery, while latent mesothelioma victims were permitted to recover. In 1973 the statute was amended to make asbestosis a compensable disease if the claim was filed within "two years after diagnosis of disease is first communicated to the employee."[345] The liberal Virginia statute thus allows claimants like Bunker to recover.

Modified Last Exposure Rules

Some states have retained the last exposure date in their occupational disease statutes of limitation, but have coupled it with discovery provisions in ways that permit *Bunker*-type claimants to recover. A typical statute designates the last exposure date as an alternative to the date of discovery.[346] Under such a scheme, the claimant must file within a certain length of time from either of these events, whichever occurs last.[347] Oklahoma, for example, stipulates that notice must be filed within eighteen months following the date of last hazardous exposure, or within three months following the disablement which the claimant attributes to an occupational disease.[348]

West Virginia

West Virginia has a similar requirement. An occupational disease claim must be filed three years from last exposure, or three years from when the worker acquires actual or constructive knowledge of the existence of the disease, whichever occurs last.[349] Claimants who were exposed to hazards prior to the 1971 enactment of the discovery alternative, however, were uncertain about which law should be applied to their claims, the old three-year last exposure rule or the new law requiring employee knowledge to commence the limitation period. The claimant

345. *Id.* § 65.1-52(2a). The statute also provides that:

> In any case in which a claim is being made for benefits for a change of condition in an occupational disease (e.g., advancing from one stage or category to another) the claim must be filed with the Commission within three years from the date for which compensation was last paid for an earlier stage of the disease, except that a claim for benefits for a change in condition in asbestosis must be filed within two years from the date when diagnosis of the advanced stage is first communicated to the employee.

Id. § 65.1-52(3); *see also infra* notes 362-64 & accompanying text.

346. Kentucky and Wyoming also have retained their last exposure rules as alternative trigger dates. However, instead of using discovery of the occupational nature of the disease as the other alternative, these states use the time of disability. KY. REV. STAT. § 342.316(1)(b) (1981); WYO. STAT. § 27-12-503(b) (1977).

347. *See, e.g.* WYO. STAT. § 27-12-503 (1977).

348. OKLA. STAT. ANN. tit. 85, § 24 (West Supp. 1983-1984).

349. W. VA. CODE § 23-4-15 (1981).

in *Lester v. State Workmen's Compensation Commissioner*[350] discovered that he had occupational pneumoconiosis in April 1971; he filed his claim on March 22, 1973. Because Lester's last exposure occurred on March 13, 1970, the Commissioner ruled that the claim was not timely under the three-years-from-last-exposure rule in effect at the time of his exposure.[351] On appeal Lester argued that his claim should not be barred because before his three-year limitation period had expired, the legislature had amended the statute so that the three-year limitation period ran from the time the claimant knows or should have known that he has occupational pneumoconiosis.[352] The supreme court ruled that Lester could take advantage of the new limitation period, thus making his filing timely.[353]

The court deemed that the legislature had intended the retroactive application of the statute.[354] The court rejected defendant's argument that such an extension unconstitutionally impaired contractual obligations, noting that the right to workmen's compensation benefits was not consensual or contractual,[355] but arose from the duties and responsibilities that the law attaches to the status of the employer-employee relationship.[356]

The court also rejected the argument that retroactive application unconstitutionally impaired the vested property rights of the employer by extending its liability beyond the previously established cut-off date. It found that rights did not vest until the statute of limitations had completely run and the suit was barred.[357] Because Lester's three years-from-last-exposure period had not elapsed before the Legislature extended the period, the suit was not barred.

Arguably, the court's application of the statute would help only those few claimants whose time to file had begun, but not ended, before July 1, 1971. Anyone whose exposure ended before 1968 would be barred. A subsequent decision further extended the *Lester* ruling. In *Bailey v. State Workmen's Compensation Commissioner*, the court held that worker compensation statutes of limitation are procedural, not juris-

350. 242 S.E.2d 443 (W. Va. 1978).
351. *Id.* at 444.
352. *Id.* at 445; W. VA. CODE. § 23-4-15 (1981).
353. 242 S.E.2d at 447.
354. The court stated: "Keeping in mind the beneficient purposes of the Workmen's Compensation Act and the liberality rules as to its construction, and being aware of the mischief sought to be remedied by the legislative amendments, we perceive no reason why the legislature would not have intended such amendments to be applicable . . . ." *Id.* at 445-46.
355. *Id.* at 449-50.
356. *Id.* at 450-51.
357. *Id.* at 452.

dictional.[358] Therefore, failure to comply with them is excusable. Thus, a plaintiff who could demonstrate innocent mistake, excusable neglect, unavoidable cause, fraud, misrepresentation, other misconduct of an adverse party, or "any other reason justifying relief,"[359] might recover in West Virginia, although exposure to the hazard had terminated several years before the more liberal statute was enacted.

Florida

Florida has retained its last injurious exposure rule in a different way. The statute requires filing within two years from the date of injury,[360] which has been judicially defined as the date of disablement. The claimant has the burden of proving that the date of last exposure was not the date of disablement.[361]

Virginia

Virginia applies a straightforward last exposure rule to most occupational diseases. *Claimants must file within five years of their last exposure.*[362] Mesothelioma and a few other diseases, however, are exempted from the five year limitation.[363] Thus, *Bunker*-type plaintiffs whose diseases fall within the enumerated categories can recover, while others, who arguably are similarly situated, will not. Although this type of statute is especially subject to attack on equal protection grounds, that argument did not prevail in the *Bunker* case.[364]

Oregon

Oregon has an unusual combination of discovery and last exposure rules.[365] For most occupational diseases, claimants must meet two limi-

358. 296 S.E.2d 901, 905 (W. Va. 1982). The court again looked to worker compensation history and the "fiction" about the consensual nature of the arrangement as the reason why such statutes had been considered jurisdictional in the past. *Id.* at 904. The early workers' compensation statutes were conceptualized as consensual in nature. Thus, to satisfy standards of constitutionality, it was necessary for the early compensation programs to appear voluntary. It was a claimant's right to "participate" that depended upon his satisfacton of statutory requirements. While later decisions had recognized that the compensation system was a product of state police power, and in effect was compulsory, judicial "inertia and neglect" prevented the courts from recognizing the procedural nature of the limitation provisions. *Id.*

359. *Id.* at 905.

360. FLA. STAT. § 440.19(1)(a) (Supp. 1984).

361. American Beryllium Co. v. Stringer, 392 So. 2d 1294 (Fla. 1980).

362. VA. CODE § 65.1-52 (1950 & Supp. 1984) (emphasis added).

363. *Id.*

364. *See supra* notes 58-71 & accompanying text.

365. OR. REV. STAT. § 656.807(1)-(4) (1983).

tation requirements.[366] First, they must file within five years of last exposure. Second, they must file within 180 days of either disablement or the date they are informed by a physician that they are suffering from an occupational disease, whichever is later.[367] This second requirement makes disablement a predicate for recovery, but disablement without knowledge of the nature of the disease is insufficient to trigger the limitation period under this provision. [368]

In 1981 the five-year limitation provision was extended to forty years for asbestos-related diseases.[369] In a recent asbestosis case the claimant filed more than five years after his last exposure to asbestos, the statutory limit at the time of his filing.[370] By the time the Oregon Supreme Court reviewed claimant's constitutional challenge to the shortness of the five-year limitation period, the Legislature had acted to protect similar claimants in the future.[371] But because this claim had been filed prior to the liberalizing amendment and after the five-year statute had run, no retroactive application of the forty-year period was possible.[372] As in *Bunker*, the court was unpersuaded that the limitation denied claimant's right to a remedy because the five-year limitation had barred his claim before the disease had developed.[373]

366. *Id.* § 656.807(1).

367. *Id.*

368. This provision tolls the 180 day limitation period until the disabled claimant acquires knowledge of the occupational nature of the disease from a physician. A nondisabled person with such knowledge is, of course, ineligible for wage compensation.

369. *Id.* § 656.807(4).

370. Stone v. State Accident Ins. Co., 57 Or. App. 808, 646 P.2d 668 (1982).

371. *Id.* at 811, 646 P.2d at 670 (citing OR. REV. STAT. 656.807(4) (1983)).

372. Claimant Stone voluntarily retired from work in 1973. The referee found that claimant was not informed that he suffered from asbestosis until March 22, 1979, even though a physician diagnosed his symptoms as asbestosis on October 5, 1978. Claimant filed within 180 days after he was informed by a physician that he suffered from asbestosis; however, his claim was barred by the second provision of the section because he filed it more than five years after his last injurious exposure.

If Stone had been disabled after the 1981 law became effective, presumably his claim would then have been timely. Although the court stated that "[a]pplication of this [new] statute is not involved in this case," 57 Or. App. at 811, 646 P.2d at 670, it is evident that Stone met both the 40-year last exposure requirement and the alternative 180-day discovery rule. The result is consistent with the principle that the date of disablement should determine which version of the law to apply to the claim. *See infra* notes 402-04 & accompanying text.

373. The Oregon Court of Appeals held that Stone's constitutional claims lacked merit, citing Josephs v. Burns & Bear, 260 Or. 493, 503, 491 P.2d 203 (1971). In *Josephs*, the Oregon Supreme Court held that it was "a permissible legislative function" to balance the possibility of barring legitimate claims against the public need to put a time limit on potential litigation; hence, the five year limit on filing claims was not unconstitutional. 57 Or. App. at 811, 646 P.2d at 669.

The Court further stated that, while the 1981 amendment extending the time limitation for asbestosis and asbestos-related claims to 40 years evidences the Legistature's perception

Discovery Rules with Conclusive and Rebuttable Presumptions Based on Minimum Exposure

A few states that have discovery statutes have attempted to protect employers from payment of nonoccupational disease claims by establishing either a conclusive or rebuttable minimum exposure presumption. If the claimant's exposure is shorter than the statutory period, it will be conclusively or rebuttably presumed that the disease was not occupationally caused. Louisiana, for example, creates a presumption that a disease contracted in less than twelve months is nonoccupational.[374] This presumption can only be overcome by an "overwhelming preponderance" of the evidence.[375] Since many occupational diseases are product-specific,[376] as was Bunker's, this burden of proof would not be difficult to meet in a substantial number of claims.[377]

Kentucky has a limited presumption in favor of pneumoconiosis victims.[378] Section 342.316(5) states that ten years of exposure to a pneumoconiosis hazard provides a presumption of causation.[379] Less than ten

that the short limitation period placed on claims for diseases with long latency periods works an inequality, it does not render the five-year time limit of the former Act unconstitutional because, "the legislature is entitled to right perceived wrongs one at a time." *Id.* at 811, 646 P.2d at 670.

374. LA. REV. STAT. ANN. § 23:1031.1(D) (West Supp. 1984). Some states have liberally construed their "contraction" requirements. *See, e.g.*, Taylor v. Cone Mills Corp., 56 N.C. 291, 289 S.E.2d 60 (1982); Christopher v. Consolidated Coal Co., 222 Tenn. 727, 440 S.W.2d 281 (1969). Because the time of disease contraction plays a role in the limitation period of several statutes, discrepancies in interpretation can occur. For discussions of state statutes interpreting the word "contraction", see *supra* notes 218-24 (South Carolina), 230-37 (Nevada), 313-16 (Minnnesota), 338-42 (New York) & accompanying text. If contraction is defined as any time before disease symptoms become manifest, a *Bunker*-type claimant could be barred if the statutory period runs out prior to his or her awareness that the disease exists. While the trend is toward interpreting "contraction" to allow delayed manifestation injury compensation, legislatures would be well advised to rid their occupational disease statutes of the term given the temporal uncertainty inherent in it.

375. *Id.*

376. *E.g.*, asbestosis is only caused by exposure to asbestos; silicosis by exposure to silica dust; meatwrapper's asthma by exposure to heated polyvinyl chloride film; black lung by exposure to coal dust.

377. At least one state has eliminated such presumptions from its statutes in the past several years. *See, e.g.*, TEX. STAT. ANN. art. 8306, § 26 (Vernon 1967) (repealed 1971) (presumption that disability is not due to employment unless during 10 years immediately preceding incapacity employee was exposed for five years to the hazard, of which two years were within the state, and employee could not be exposed outside the state more than one year prior to incapacity).

378. KY. REV. STAT. § 342.316(5) (1983).

379. There also appears to be a judicially-created presumption that retirement creates the presumption that an employee is aware of a manifestation of his disease. *See, e.g.*, Inland Steel Co. v. E.H. Terry, 464 S.W.2d 284 (Ky. Ct. App. 1971).

years of exposure would appear to raise no presumptive bar to recovery, except, perhaps, by implication.

Public Policy Issues

The chart in the Appendix summarizes the major characteristics of the various state limitation statutes governing occupational disease claims. We emphasize, however, that many jurisdictions have applied considerable judicial gloss to these provisions and that a number of statutes have recently (within the past ten to fifteen years) undergone major legislative revision. We believe the revision process will continue and will facilitate worker recovery. Yet, as is evident from the preceding discussion, compensation for delayed manifestation occupational diseases is highly dependent upon a multiplicity of factors which vary widely from state to state—factors such as dates of last exposure, last employment, disablement, and contraction; length and severity of exposure to hazards; the identity of the specific hazards causing disease; claimants' residence in the state while exposed; claimants' knowledge of the existence of disease and its relationship to employment; and, finally, the choice of which amendments to the original statutes will be applied to the claims. The potential for inequity in such a hodge podge is significant. This section explores the public policy problems that jurisdictions face when devising and revising their worker compensation systems and the other compensation mechanisms that interact with them.

Retroactive Application—Which Law Should Control the Claim?

State occupational disease acts, including their statutes of limitation, frequently have been amended in the past few decades; often the amendments liberalize the acts. Therefore, the threshold question frequently is: which version of the limitation statute should apply—the current law or an earlier enactment?[380] The problem arises because decades may pass

380. This Article has discussed several controlling statute cases. *See supra* notes 235-37 & accompanying text (Prescott v. United States, 523 F. Supp. (D. Nev. 1981)), notes 113-18 & accompanying text (Hall v. Synalloy Corp., 540 F. Supp. 263 (S.D. Ga. 1982)), notes 280-87 & accompanying text (Stark v. Zimmerman, 638 P.2d 843 (Colo. 1981)), notes 29-44 & accompanying text (Bunker v. National Gypsum Co., 406 N.E.2d 1239 (Ind. App. 1980)), notes 172-76 & accompanying text (Davis v. Bath Iron Works Corp., 338 A.2d 146 (Me. 1975), note 215 (Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982)), notes 202-15 & acccompanying text (Wood v. J.P. Stevens, 297 N.C. 636, 256 S.E.2d 692 (1979)), notes 358-59 & accompanying text (Bailey v. State Workmen's Compensation Comm'r, 296 S.E.2d 904 (W. Va. 1982)), notes 349-57 & accompanying text (Lester v. State Workmen's Compensation Comm'r, 242 S.E.2d 443 (W. Va. 1978)); *cf. supra* notes 315-16 & accompanying text (Yaeger v. Delano Granite Works, 236 Minn. 128, 52 N.W.2d 116, 117 n.1 (1952) (post-disability

before an occupational disease develops to the point that the worker is disabled and eligible to file a claim for compensation. Prior to disablement, however, often there are several significant events that occur in the history of these delayed manifestation diseases. Arguably, the law in effect when these events occur should govern the claim, even though the actual filing comes much later. The first significant event is gaining the employment in which the hazardous substance exists. The law governing the original employment contractual relationship could be considered as setting forth the rules under which the parties impliedly agreed to be governed.[381] The second event is the employee's initial exposure to the hazard that ultimately leads to a compensable claim.[382] Next is that metaphysical moment when the disabling disease becomes inevitable, although no symptoms or indications of its existence are yet manifest. This moment is often indeterminable, even through hindsight analysis, yet arguably it is the point when injury to the claimant first occurred.[383] Still later, in no certain order, come the manifestation of symptoms,[384] constructive knowledge of the relationship of the symptoms to the employment,[385] the worker's actual knowledge of the relationship,[386] the worker's last injurious exposure to the hazard,[387] amendment of the stat-

amendment not discussed)), notes 370-73 & accompanying text (Stone v. State Accident Ins. Fund Corp., 57 Or. App. 808, 646 P.2d 668 (1982) (post-disability amendment not discussed)).

381. *See* Hall v. Synalloy Corp., 540 F. Supp. 263 (S.D. Ga. 1982); Lester v. State Workmen's Compensation Comm'r, 242 S.E.2d 443 (W. Va. 1978).

382. *See* Schmidt v. Merchant's Dispatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936). In *Schmidt*, the court held that an employee's *negligence* claim against an employer for creating an unreasonable risk of pneumoconiosis accrued when the employee first inhaled deleterious dust: "when the forces wrongfully put in motion produce injury." *Id.* at 300, 200 N.E. at 827. This "impact" or "wrongful act" rule has been consistently upheld in New York tort cases. *See, e.g.,* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142 (1963), *cert. denied*, 374 U.S. 808 (1963); Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 417 N.Y.S.2d 920, 391 N.E.2d 1002 (1979). The *Schmidt* court assumed that because disease did develop, its development was inevitable from the moment the employee first inhaled the dust. Thus, the first inhalation was actionable.

383. The *Schmidt* rule was reaffirmed in Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981). In his dissent in *Steinhardt*, Judge Fuchsberg contrasted impact and harm. He argued that while impact to the plaintiff occurs upon first exposure, harm occurs only if the disease begins to develop. He concluded that if symptoms do emerge, the trier of fact should decide when the disease began. *Id.* at 1011-14, 430 N.E.2d at 1301, 446 N.Y.S.2d at 244-48 (Fuchsberg, J., dissenting). The Indiana Supreme Court has cited the *Schmidt* rule with approval. *See supra* note 44 & accompanying text. The Seventh Circuit Court of Appeals, however, questioned whether the Indiana court had cited these cases to adopt an "impact" rule or merely to reject a "discovery" rule. *See* Braswell v. Flintkote Mines, Ltd., 723 F.2d 527, 532-33 (7th Cir. 1983).

384. *See supra* notes 292-300 & accompanying text.

385. *See supra* notes 301-41 & accompanying text.

386. *Id.*

387. *See supra* notes 100-224, 347-73 & accompanying text.

ute before the employment has terminated,[388] the termination of employment,[389] amendment of the statute after the employment has terminated,[390] the running of an earlier version of a statute of limitations,[391] temporary total disability of the worker,[392] temporary or permanent partial disability,[393] total permanent disability, and premature, job-related death.

Many of these milestones in occupational disease development have been the focus of litigation to resolve the controlling law problem. Part II of this Article presented many of the arguments for and against adopting one or the other of these trigger dates.[394] We conclude that no formula for choosing the law to govern a long developing claim is without problems. A suggestion that has some appeal comes from Professor Larson, who favored using the time of disability for resolving the controlling law question. Professor Larson noted that "in most instances the [disabled] claimant ought to know he has a compensable claim,"[395] although he may not.[396] And while, as Larson observed, the time of disability seems to be a definite event,[397] some flexibility is introduced in determining the date through the conscious choice of the claimant, on the one hand, and the judgment of the physicians and the tribunal which

388. *See supra* note 381.

389. *See supra* notes 242-70 & accompanying text.

390. *See supra* note 381.

391. *See supra* notes 280-87, 369-73 & accompanying text.

392. *See supra* note 34 & accompanying text. Richard Bunker was totally, but only temporarily, disabled. In his dissent, Justice Hunter argued that Bunker's claim should be denied solely because Bunker was not disabled within the meaning of the statute. Bunker v. National Gypsum Co., 441 N.E.2d 8, 14-18 (Ind. 1982) (Hunter, J., dissenting). The majority opinion ignored this argument.

393. As used here, partial disability means an inability to earn *full* wages in any employment. In Nevada, however, only totally disabled employees may file claim. *See supra* notes 231-37. This Article assumes that absent an express statutory requirement of total disability, claimants can file for benefits when first partially disabled. If the claimants later become totally disabled, they may file for additional compensation. The special state rules for additional compensation are beyond the scope of this discussion.

394. *See supra* note 380.

395. 4 A. LARSON, *supra* note 2, § 95.21, at 17-85. Professor Larson no longer urges using the date of disability to solving the controlling statute issue in disputes between insurers. He simply notes that: "In the search for an identifiable instant in time which can be used to determine when the 'injury' occurred for purposes of determining which year's statute to apply, and who is the last employer for purposes of the last injurious exposure rule, the date of disability is frequently chosen." *Id.* § 95.25(a), at 17-149 to -150. The "last injurious exposure rule" mentioned by Larson is, however, solely a method of determining liability among multiple carriers for a claim; the rule does not help determine whether a claim is compensable.

396. *See* Hamilton v. Jeffrey Stone Co., 6 Ark. App. 333, 641 S.W.2d 723 (1982); *supra* notes 90-105 & accompanying text.

397. 4 A. LARSON, *supra* note 2, § 95.21.

must fix the exact date, on the other. Perhaps the most compelling reason advanced by Professor Larson for choosing the time of disability to govern the choice of law is that it is the moment when the claim becomes actionable.[398]

Yet there is considerable force in the vested rights, retroactive application, and contractual impairment arguments which have been advanced to resist application of newly enacted discovery rules, or lengthened limitation periods, to claims, rights, and liabilities long believed, with reasonable justification, to have been in repose. Once a five year statute of limitations has run, perhaps that should be the end of it, even though the claimant later becomes disabled after a new discovery rule has come into effect.[399]

The application of earlier versions of these laws, however, frequently leaves the worker or ex-worker without relief;[400] the humanitarian objectives of the workers' compensation system are ill served if substantial numbers of claimants are denied relief for injury arising out of and in the course of their employment. Nor are the objectives of economic efficiency served when the enterprises that generate physical harm fail to bear the full costs of that harm, inducing the claimant to rely on other compensation mechanisms—Social Security disability, local welfare, hospitalization insurance, and the like—or worse, to resort to the inefficient tort system for relief by bringing product liability claims against third parties.[401]

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398. *Id.* Larson states that: "Legally, it is the moment at which the right to benefits accrues."

399. *See supra* notes 279-86 & accompanying text.

400. Occasionally a claimant may seek to apply an earlier law to avoid the exclusivity of the state's workers' compensation statute. This is especially true when the employee wishes to bring a common-law action for negligence against the employer. *See, e.g., supra* notes 29-44, 112-22 & accompanying text. More often, it is the employer who seeks the protection of earlier, more restrictive language. *See, e.g., supra* notes 202-15 & accompanying text.

401. There have been a number of estimates of the cost effectiveness of tort litigation, especially with respect to product liability claims. One study places product liability personal injury defense costs at 35 cents per dollar of claim payment, or 26% of the total cost. INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 11 (1977). Using the Insurance Services Office defense cost figures and typical contingency fee arrangements, it is reasonable to estimate that successful plaintiffs recover a net amount of about 40% of the total premium dollar. Another study places the plaintiff's total legal costs at 54% of recovery (77 cents for every 66 cents of recovery). Schwartz, *Historical Overview of Workplace Compensation & Evolution of Possible Solutions*, in FINAL EDITED PROCEEDING OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 39, 43 (1981) (citing American Insurance Association study).

Still another figure was derived by dividing the $234 million in claims paid out in 1979 by the $1252 million taken in that year by the five top insurance companies. This results in an 18

On balance, the time of disablement is probably the best choice for determining the law and running the statute of limitations. Although arguments opposed to this trigger date have prevailed infrequently,[402] state legislatures can address employers' reasonable objections to *unexpected* retrospective application of later-enacted amendments by enacting a statute providing that current occupational disease law will apply to any employee not yet disabled, no matter when exposure took place or when the disease is presumed to have been contracted. As a result, employers and insurers will be on notice that future amendments are likely to be applied the same way.

It is surprising and unfortunate that the controlling law problem is still so frequently litigated. A system like workers' compensation, which is based on certainty, needs more certain ground rules. Although using "the time of disability" as the event that determines the controlling law will create a more speculative insurance environment than underwriters would prefer, it is probably better for the economy if the workers' compensation system bears the uncertain risks than if the tort litigation system or the welfare system is the arena for allocating the costs. Workers' compensation eliminates the expensive determination of fault,[403] yet it

3/4% net return to claimants. Bendorf, *Broadening the No-Fault Compensation Option*, in FINAL EDITED PROCEEDING OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY, 284, 287 (1981) (citing Product Liability Supplements filed by insurance companies). Although revenue and disbursement figures for 1979 demonstrate very little, they do raise the important and controversial question of investment income. Cost effectiveness calculations must include the time value of the premium dollar. Today's premium dollar should yield more than a dollar's worth of future claims. The interest earned on reserved funds is a cost that should be assigned to the litigation system.

Another statistic on asbestos-related disease is illustrative. A Rand Corporation study shows that victims who litigated asbestos-related claims in the 1970's recovered an average of $35,000, but incurred an average of $60,000 for legal expenses. Miller, *Drawing Limits on Liability*, Wall St. J., Apr. 4, 1984, at 26, col. 4.

In contrast, the workers' compensation system probably returns over 60% of the premium dollar. *See* Comments by M. Markman, Minn. Ins. Comm'r., in FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 112 (1981).

402. Of the 11 controlling statute decisions discussed in this Article, *see supra* note 380, only *Hall v. Synnalloy Corp.* and *Stark v. Zimmerman* rejected explicitly or implicitly the date of disablement as the controlling date for determining which version of the limitation statute to apply.

403. Under workers' compensation law, fault is not at issue except for cases of intentional torts by the employer, or intentional or reckless conduct by the employee. *Causation*, however, is increasingly disputed. *See* Phillips, *The Relationship Between the Tort System & Workers' Compensation*, in FINAL EDITED PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 50 (1981). "These cases are being litigated vigorously today . . . . They are being litigated on the question of causation because often there is multiple causation. As for asbestos and brown lung, . . . [the litigation levels] are already near the tort system . . . ." *Id.* at 56.

retains incentives for the employer to perform better in the future. Although workers' compensation provides injured employees with only partial relief, it does so with more certainty than the tort system and with more efficiency and dignity for the claimant than either the tort or welfare systems. These characteristics make the workers' compensation system the compensation mechanism of choice for work-related health impairments.[404] A "time of disability" rule for determining the control-

404. *But see* Phillips, *supra* note 403, at 50-56. Professor Phillips argues that the workers' compensation system provides inadequate safety incentives to the employer. He would restore the worker's negligence tort action as a parallel remedy. In support of this suggestion he makes three points. First, 20% of the covered employees and 80% of the covered employers are not experience-rated. Second, third party actions demonstrate how employer compensation compensation is only slightly more cost effective than the tort system with respect to transaction costs—60% payout ratio for workers' compensation versus 40% payout ratio for tort. Nevertheless, he questions running these costs through the welfare and social security systems which now absorb $2.2 billion annually. *Id.* at 56.

Professor Phillips overstates the experience-rating problem. He notes that some commentators argue that only large employers can be efficiently experience-rated. In contrast, small employers, generally stores and fast food outlets, less frequently pose the life threatening hazards of heavy industry. If a small business does incur a series of severe losses, its assigned risk premium level will generally increase greatly. This sanction should inhibit the likelihood that large companies might subcontract risky jobs to small non-experience-rated risk entrepreneurs.

Phillips correctly assumes that the primary responsibility for workplace safety rests with the employer. *See infra* note 512. This, however, presents an even stronger reason both to eliminate third party actions and reduce barriers to worker recovery under workers' compensation. The negligence remedy should not be one-sided. If employers must provide certain and prompt workers' compensation relief without regard to worker negligence, employers should not be liable for additional penalties when they are negligent. There is no quid pro quo for the employer's acceptance of compensation system can be adjusted to provide them.

Finally, Professor Phillips finds the transaction cost differences between the two systems, *e.g.*, 60% and 40%, less than decisive. The real payout gap, however, is probably greater than this. *See supra* note 401. But even as stated, the cost-effectiveness differential between tort and workers' compensation is substantial. Moreover, while workers' compensation efficiency can be improved, the cost-effectiveness of tort litigation is likely to worsen. The recent Agent Orange settlement, *see* Nat'l L.J., May 21, 1984, at 1, col. 1, and the "claims facility" proposed by asbestos defendants and their insurers, *see* Bus. Ins., Apr. 10, 1984, at 1, col. 5, however, are promising developments.

Many workers' compensation claims are being litigated today because designers of the occupational disease funding structure did not anticipate the magnitude of the problems encountered by workers exposed to toxins. The courts, however, are not the place to fight these battles. Perhaps a legislative or voluntary structure for no-fault tort compensation will emerge and diminish judicial activity.

Tort litigation regarding workplace injuries should be restricted to egregious conduct by employer or employee. For example, courts should grant exceptions to the exclusivity principle when employers are charged with the intentional tort of concealing hazardous workplace conditions from employees. *See infra* note 496 & accompanying text. Alternatively, employee right-to-know statutes should provide for private causes of action against violating employers (Right-to-know statutes require an employer to disclose to an employee all known hazards in

ling law would exploit these characteristics by making a greater number of claimants eligible for relief under the system.

Equal Protection and Due Process—Tort and Workers' Compensation Statutes Compared

When worker compensation statutes were first passed, they came under constitutional attack on substantive due process grounds.[405] New York's statute, enacted in 1910, was held unconstitutional in *Ives v. South Buffalo Railway*,[406] primarily on the ground that holding employers liable without regard to their fault denied them due process.[407] Other constitutional challenges to the new statutes were based on deprivation of the substantive due process right of freedom to contract.[408] To overcome these constitutional challenges, statutory coverage in many states was made elective, and the compensable injuries were limited.[409] In 1917 the United States Supreme Court upheld a compulsory worker compensation law as being a "reasonable exercise of the police power of the state."[410] The court concluded that the public had a direct interest in compensating workers "for human life or limb lost or disability incurred."[411] Since that time, coverage has become increasingly compulsory and

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the workplace. New York has such a statute, N.Y. LABOR LAW § 880 (McKinney Supp. 1984-1985)). The merits of such proposals, however, are beyond the scope of this Article.

Phillips further develops the legal and conceptual basis for his dual track compensation scheme in a working paper. *See* Phillips, *Compensation—The True Cost*, FINAL EDITED PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKERS' COMPENSATION AND WORKPLACE LIABILITY 84 (1981).

405. Lester v. State Workmen's Compensation Comm'r, 242 S.E.2d 443, 447 (W. Va. 1978); 1 A. LARSON, *supra* note 2, § 5.20.

406. 201 N.Y. 271, 94 N.E. 431 (1911); *see* E. BLAIR, WORKMEN'S COMPENSATION LAW 1-1 (1968); Special Project, *supra* note 9, at 732 n.1059.

407. *Ives*, 201 N.Y. at 280, 94 N.E. at 439. The New York constitution was subsequently amended to allow a compulsory law, and a workers' compensation law was passed in 1913. *See* Lester v. State Workmen's Compensation Comm'r, 242 S.E.2d 443, 448 (W. Va. 1978) (discussing New York law). The United States Supreme Court upheld the constitutionality of the 1913 law in New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917). *Cf.* Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (similar Washington statute upheld).

408. *See, e.g.*, Bailey v. State Workmen's Compensation Comm'r, 296 S.E.2d 901, 905 (W. Va. 1982).

409. 1 A. LARSON, *supra* note 2, § 5.20. New Jersey was the first state to pass an "elective" or "optional" statute. Several states limited their statute's coverage to "hazardous" employment because of questions regarding the extent of the states' police power. *Id.*

410. New York Cent. R.R. Co. v. White, 243 U.S. 188, 206 (1917). Plaintiffs challenged the statute on the substantive due process ground that it denied them the opportunity to choose the terms of employment, and they were therefore denied their liberty to acquire property. *Id.*

411. *Id.*

comprehensive.[412]

Although the beneficent, noncontractual nature of worker compensation statutes has long been recognized, many workers are uncompensated for work-related disabilities.[413] Increasingly, the workers who suffer delayed manifestation occupational diseases are the ones who fall outside the statutes. Today, the primary constitutional challenges to the worker compensation laws are mounted on behalf of these individuals because the time for filing their claims elapses before they can become aware of, or before they are disabled by, their injuries. Bunker's equal protection and due process challenges discussed above exemplify these arguments.[414]

Similar due process and equal protection arguments have been used to challenge tort statutes of limitation and repose which abrogate rights before knowledge of the injury, or even the injury itself, has occurred.[415] While the great majority of states use a discovery-of-injury statute of limitations for torts,[416] an increasing number of states have set a limit on how long the plaintiffs in certain classes of torts have to discover the injury caused by the defendant's act. This limit, applied commonly in the medical malpractice,[417] architect-builder,[418] and product liability[419]

412. 1 A. LARSON, *supra* note 2, § 5.30; P. BARTH & H. HUNT, *supra* note 3, at 2-3.

413. *See, e.g.*, Lester v. State Workmen's Compensation Comm'r, 242 S.E.2d 443, 445-46 (W. Va. 1978); Bailey v. State Workmen's Compensation Comm'r, 296 S.E.2d 904, 906, (W. Va. 1982); Special Project, *supra* note 9, at 736-42.

414. *See supra* notes 58-79 & accompanying text.

415. *See, e.g.*, Dworkin, *Product Liability of the 1980s: "Repose Is Not the Destiny" of Manufacturers*, 61 N.C.L. REV. 33 (1982); McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 584-85 (1981).

416. *See, e.g.*, Urie v. Thompson, 337 U.S. 163 (1949); Warrington v. Charles Pfizer & Co., 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 144 (4th ed. 1971).

417. *See, e.g.*, COLO. REV. STAT. § 13-80-104 (1973) (3 year limitation); 18 DEL. LAWS § 6855 (1974) (3 year limitation); ILL. REV. STAT. ch. 83, § 22.1 (Supp. 1984) (10 year limitation); IND. CODE § 16-9.5-3-1 (1982) (2 year limitation); IOWA CODE § 614.9 (1950) (6 year limitation); MO. REV. STAT. § 516.105 (1952) (10 year limitation). While the great majority of these statutes toll or extend the repose period for minors, a few do not. *See, e.g.*, IND. CODE § 33-1-1.5-5 (1982).

418. Since Wisconsin passed the first architect and builder repose statute in 1961, WISC. STAT. ANN. § 893.155 (West Supp. 1984), 44 states and the District of Columbia have enacted similar protective legislation. Witherwax, *Special Statutes of Limitation for Action Against the Contractor—A Defense to the Surety*, 16 FORUM 1057, 1065-79 (1981). Only Arizona, Iowa, New York, Vermont, and West Virginia have not enacted such limitations. The courts of several states have subsequently declared these repose limitations unconstitutional. *See infra* note 421.

419. *See, e.g.*, ALA. CODE § 6-5-502 (Supp. 1982); ARIZ. REV. STAT. ANN. § 12-551 (1982); COLO. REV. STAT. § 13-21-403(3) (Supp. 1982); CONN. GEN. STAT. ANN. § 52-577a (West 1981); FLA. STAT. ANN. § 95.031(2) (West 1982); GA. CODE ANN. § 51-1-11(b)(2) (1982); IDAHO CODE § 6-1403(2) (Supp. 1982); ILL. ANN. STAT. ch. 83, § 22.2(b) (Smith-

areas, is established by a statute of repose that generally runs out eight to ten years after the defendant's tortious act.[420]

Constitutional challenges to these statutes have met with varying success.[421] In most successful challenges, however, the statutes have

Hurd Supp. 1982); IND. CODE § 33-1-1.5-5 (1982); KAN. STAT. ANN. § 60-513(b) (1976); KY. REV. STAT. ANN. § 411.310(1) (Baldwin Supp. 1979); NEB. REV. STAT. § 25-224 (1979); N.H. REV. STAT. ANN. § 507-D:2 (Supp. 1979); N.C. GEN. STAT. § 1-52(16) (Supp. 1981); N.D. CENT. CODE § 28-01.1-02 (Supp. 1981); OR. REV. STAT. § 30.905 (1981); R.I. GEN. LAWS § 9-1-13 (Supp. 1982); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982); TENN. CODE ANN. § 29-28-103 (1980); UTAH CODE ANN. § 78-15-3(1) (1977); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1982).

420. The architect and builder statutes of limitation, which ranged from four years, TENN. CODE ANN. § 28-30-202 (1980), to 15 years, MINN. STAT. § 27A.5839 (Supp. 1980) (repealed 1981), generally are in the eight- to ten-year range.

Product liability repose statutes range from a low of five years, KY. REV. STAT. ANN. § 411.310(1) (Baldwin Supp. 1979), to a high of 12 years, ARIZ. REV. STAT. ANN. § 12-551 (1982); MICH. COMP. LAWS § 600.5805 (1968); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1982). But most set a 10-year repose period. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-577a (West 1981); GA. CODE ANN. § 51-1-11(b)(2) (1982); IDAHO CODE § 6-1403(2) (Supp. 1982); ILL. ANN. STAT. ch. 83, § 22.2(b) (Smith-Hurd Supp. 1982); IND. CODE § 33-1-1.5-5 (1982); KAN. STAT. ANN. § 60-513(b) (1976); NEB. REV. STAT. § 25-224 (1979); N.C. GEN. STAT. § 1-52(16) (Supp. 1981); N.D. CENT. CODE § 28-01.1-02 (Supp. 1981); R.I. GEN. LAWS § 9-1-13 (Supp. 1982); TENN. CODE ANN. § 29-28-103 (1980).

For the limitation periods for medical malpractice statutes of repose, see *supra* note 417.

421. Twenty-three states have upheld their architect and builder statutes; 12 have found them unconstitutional. Architect and builders' repose statues were upheld in Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Martinez v. Traubner, 32 Cal.3d 755, 653 P.2d 1046, 187 Cal. Rptr. 251 (1982); Salinero v. Pon, 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1981); Mullins v. Southern Co. Servs. Inc., 250 Ga. 90, 296 S.E.2d 579 (1982); Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); O'Brien v. Hazalet & Erodal, 410 Mich. 1, 299 N.W.2d 336 (1980); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Rosenberg v. Town of N. Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (N.M. Ct. App. 1977), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977); Sears, Roebuck & Co. v. Enco Assocs. Inc., 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977); Lamb v. Wedgewood S. Corp., 286 S.E.2d 874 (N.C. Ct. App. 1982); Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); McMacken v. State, 320 N.W.2d 131 (S.D. 1982); Watts v. Putnam County, 525 S.W.2d 488 (Tenn. 1975); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981); Good v. Christensen, 527 P.2d 223 (Utah 1974); State Comptroller *ex rel.* Virginia Military Inst. v. King, 217 Va. 751, 232 S.E.2d 895 (1977); Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972); Bailey v. State Workmen's Compensation Comm'r, 296 S.E.2d 904 (W. Va. 1982); Swanson Furniture Co. v. Advance Transformer Co., 105 Wis. 2d 321, 313 N.W.2d 840 (1982).

See *infra* note 423 for decisions overturning architects' and builders' statutes.

Five states have found their product liability repose statues unconstitutional; four have upheld them. *See infra* notes 428, 430 & accompanying text.

Medical malpractice reform statutes have been overturned based on barriers to plaintiffs' right to sue. While these impediments vary, *see, e.g.*, Eastin v. Broomfield, 116 Ariz. 576, 570

been overturned on state constitutional grounds.[422] The Supreme Court so far has refused to review any of the state statute of repose decisions.[423] Thus, the likelihood of successfully mounting constitutional challenges to restrictive worker compensation laws probably depends on the particular state court's interpretation of its state constitution.

Many states are overturning their medical malpractice,[424] architect-builder,[425] and products liability statutes of repose. The product liability statutes of repose are most analogous to the worker compensation limitations because they also primarily affect victims of delayed manifesta-

P.2d 744 (1977) (posting bond); Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (review panel); Linder v. Smith, 629 P.2d 1187 (Mont. 1981) (limitation on evidence); Arneson v. Olson, 278 N.W.2d 125 (N.D. 1978) (limitation on damages); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (arbitration panel), the grounds have included unconstitutional statutes of repose. *See infra* note 424.

422. *See, e.g.*, Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Skinner v. Anderson, 38 Ill. 2d 455, 459, 231 N.E.2d 588, 590 (1967); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 293 S.E.2d 415 (N.C. 1982); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 147 (Okla. 1977); Phillips v. ABC Builders, Inc., 611 P.2d 821, 842 (Wyo. 1980).

In some decisions, however, it is unclear whether federal or state constitutional grounds are the basis for the decision. *See, e.g.*, Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); State Farm Fire & Cas. Co. v. All Elec., Inc., 660 P.2d 995 (Nev. 1983); Henderson Clay Prods., Inc. v. Edgar Wood & Assoc., Inc., 122 N.H. 800, 451 A.2d 174 (1982); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978).

423. *See, e.g.*, Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971) (dismissed for want of a substantial federal question); Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979), *appeal dismissed*, 449 U.S. 807 (1980); Howell v. Burk, 90 N.M. 688, 568 P.2d 214, *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977).

424. *See, e.g.*, Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983); Jones v. State Bd. of Med., 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); State *ex rel.* Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (en banc); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

425. Architect and engineers' repose statutes were declared unconstitutional in Bagby Elevator & Elec. Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974); Overland Constr. Co. v. Simmons, 369 So. 2d 572 (Fla. 1979); Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Pacific Idem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); State Farm Fire & Cas. Co. v. All Elec. Inc., 99 Nev. 49, 660 P.2d 995 (1983); Henderson Clay Prods., Inc. v. Edgar Wood & Assoc., Inc., 122 N.H. 800, 451 A.2d 174 (1982); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Broome v. Tuluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).

Seven of these states, Alabama, Florida, Hawaii, Illinois, Minnesota, Oklahoma, and Wisconsin, subsequently revised their statues. The supreme courts of Alabama, Plant v. R.L. Reid, Inc., 294 Ala. 155, 313 So. 2d 578 (1975), and Hawaii, Shibuya v. Architects Hawaii, Ltd., 65 Hawaii 26, 647 P.2d 276 (1982), again declared the statutes unconstitutional, while the Wisconsin Supreme Court upheld its statute. United States Fire Ins. Co. v. E.D. Wesley Co., 105 Wis. 2d 305, 313 N.W.2d 833 (1982) (prospective application only).

tion injuries.[426] Thus, judicial treatment of these repose statutes is an indicator of how a state's high court will rule on restrictive workers' compensation limitations.

Five states have held their product liability statutes of repose unconstitutional.[427] Some of these states had made similar decisions regarding architect and builder,[428] or medical malpractice repose statutes.[429] Four states, however, have upheld their product liability repose statutes.[430] Of these four, Illinois has interpreted its statute to bar only strict liability suits;[431] thus, claimants can still sue for negligence in Illinois without being barred by the limit.[432] If the trend of these early decisions continues, two assumptions seem fair: first, more states will be unwilling to

426. Product liability statues of repose were passed primarily to protect manufacturers against the occasional suit based on injury from a very old product. *See, e.g.*, Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677, 690-91 (1978); MODEL UNIFORM PRODUCT LIABILITY ACT § 110 Analysis, *reprinted* in 44 Fed. Reg. 62,714, 62,734 (1979). Due to the tremendous increase in both kinds and numbers of delayed manifestation injuries caused by products, however, victims of these injuries constitute the primary group being barred. *See Lawscope—Toxic Time Bombs*, 67 A.B.A. J. 139, 140 (1981); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 n.7 (1981); Jones, *Microwave Suits Heat Up*, Nat'l L.J., Sept. 14, 1981, at 24, col. 1; Masters, *Asbestos Liability Suits Strain Manufacturers, Court Systems*, Legal Times, Mar. 30, 1981, at 1, col. 2.

427. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983); Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984).

In *Bolick v. American Barmag Corp.*, the North Carolina Court of Appeals declared the state's products liability statute of repose unconstitutional. 54 N.C. App. 589, 590, 284 S.E.2d 188, 189. The North Carolina Supreme Court modified that holding stating that the statute was not to be applied to the case because such application would have been retroactive. Accordingly the supreme court ruled that the court of appeals was not empowered to decide the issue. 306 N.C. 364, 370-72, 293 S.E.2d 415, 420-21.

The Fourth Circuit Court of Appeals has since held the North Carolina statute to be constitutional. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

428. Bagby Elevator & Elec. Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974); Overland Constr. Co. v. Simmons, 369 So. 2d 572 (Fla. 1979); Henderson Clay Prods., Inc. v. Edgar Wood & Assoc., Inc., 122 N.H. 800, 451 A.2d 174 (1982).

429. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

430. Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981); Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981); Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194, *cert. denied*, 297 Or. 82, 679 P.2d 1367 (1984); Mathis v. Eli Lilly & Co., 577 F. Supp. 35 (E.D. Tenn. 1981).

431. ILL. ANN. STAT. ch. 110, § 13.213(3) (Smith-Hurd Supp. 1982); Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981).

432. In addition, the Tennessee statute has been narrowly interpreted. Federal courts have held that it is tolled for minors, Tate v. Eli Lilly & Co., 522 F. Supp. 1048 (M.D. Tenn. 1981), and that it should not be applied retroactively, Murphree v. Raybestos-Manhattan, Inc., 696 F.2d 459 (6th Cir. 1983). The *Murphree* court also held that asbestos-related claims were exempted from the 10-year limit under a 1979 statutory amendment.

deny individuals the right to sue before their delayed manifestation injuries develop; and second, those states which previously have held their tort repose statutes to be unconstitutional may similarly hold unconstitutional a worker compensation statute that abrogates the right to claim compensation before occupational disease develops. Because the worker compensation system is designed to be less restrictive than the tort system, the constitutional arguments seem even more persuasive in this context.[433]

The primary grounds for overturning state product liability statutes have been due process arguments based specifically on a denial of the right of access to the courts guaranteed under a number of state constitutions. Alabama, Florida, North Carolina, and Rhode Island courts have so held.[434]

For example, Alabama's statute required that suit be brought within one year of injury unless the injury was latent or developed slowly, in which case suit had to be brought at the time of discovery of the injury. In no event, however, could suit be brought more than ten years after first use by the consumer.[435] In reviewing this statute, the court found that it violated the Alabama constitutional provision that "all courts should be open; and that every person, for any injury done him . . . shall have a remedy by due process of law . . . . "[436] The court concluded that the provision incorporated into the constitution a fundamental principle of fairness and a limitation on the power of government to act arbitrarily and to infringe on individual rights.[437] A two-tier review approach was used to determine if the statute met these principles. The court stated that if legislation alters or abolishes common law rights, then the legislation will be reviewed more strictly. The review will determine whether rights were voluntarily exchanged for equivalent benefits or protection—a quid pro quo—or alternatively, whether the legislation eradicated a perceived social evil and was thus a valid exercise of the police power.[438] The Alabama court found neither a quid pro quo nor a

433. *See* Bailey v. State Workmen's Compensation Comm'r, 296 S.E.2d 904, 906 (W. Va. 1982); 1 A. LARSON, *supra* note 2, § 1.20 (1964).

434. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982) (applying ALA. CONST. art. I, § 13); Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980) (applying FLA. CONST. art. I, § 21); Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981) (applying N.C. CONST. art. I, § 18), *modified*, 306 N.C. 293, S.E.2d 415 (1982); Kennedy v. Cumberland Eng'g. Co., 471 A.2d 195 (R.I. 1984) (applying R.I. CONST. art. I, § 5).

435. ALA. CODE § 6-5-502(c) (1975).

436. ALA. CONST. art. I, § 13.

437. *Lankford*, 416 So. 2d at 999.

438. *Id.* at 1000-01.

social evil that the legislation would eradicate.[439]

Compulsory worker compensation statutes have long been considered a legitimate exercise of the states' police power, exercised for the good of society by granting benefits to injured workers.[440] This exercise of power loses its legitimacy, however, if the statute fails to achieve this purpose. For workers injured by delayed manifestation occupational diseases, arguably there is no substantial relationship between the statute and its goal.[441] Thus, excessively short time limitations for these types of workers may be overturned under a substantial relationship test.

The Alabama Court's finding that there was no quid pro quo to justify that state's product liability repose provision would be even more relevant in the workers' compensation context. The historic bargain by which workers surrendered their common-law rights to sue employers in exchange for partial, but certain, no-fault relief provided workers with a more than adequate quid pro quo because common-law rights, in practice, had left the injured worker without a remedy.[442] Today, however, the quid pro quo is no longer adequate for victims of delayed manifestation diseases in states with restrictive limitation provisions; these workers receive no equivalent benefits for their loss of the right to sue.

Another constitutional infirmity of the product liability repose statutes lies in the seemingly arbitrary distinctions made between various classes of people injured by products. Some of these distinctions were held to be arbitrary because they discriminated among victims who discovered their product-related injuries within months of each other, granting the right to sue only to those who made the discovery before the limitation period ended.[443] The repose statutes also made arbitrary distinctions between people injured by products and those injured in other

439. The legislature stated in § 6-5-500 that the "social evil" was the substantial increase in the volume and cost of product liability litigation, and the resultant increase in consumer prices and cost of product liability insurance. ALA. CODE § 6-5-500 (1975).

The court, after citing several studies, found that individual state reform had no effect on insurance rates because the rates are set on a nationwide basis. In addition, they found there was no product liability "crisis." 416 So. 2d at 1001-03.

440. *See, e.g.*, New York Cent. R. R. v. White, 243 U.S. 188 (1917); Bailey v. State Workmen's Compensation Comm'r, 296 S.E.2d 901, 904 (W. Va. 1982).

441. *See, e.g.*, Special Project, *supra* note 9, at 736, 738-39.

442. *See, e.g.*, 1 A. LARSON, *supra* note 2, § 5.20; Note, *Compensation and the Asbestos Industry*, 33 SYRACUSE L. REV. 1073, 1079-80 (1982).

443. *See, e.g.*, Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1003 (Ala. 1982):

> The statute, by tying the period to date of use, as opposed to the accrual date of the cause of action, would permit a purchaser of a defective product to sue for injuries received nine years and eleven months after the first use, whereas it would bar the action of a purchaser who was injured by the same defective product ten years and one month after he first used the product.

tortious ways.[444] Whether these distinctions were challenged on due process or equal protection grounds, they failed to pass muster under a heightened standard of review.

When the worker compensation statutes are examined under this heightened standard, they seem similarly flawed. Most states which have restrictive limitation periods for delayed-manifestation occupational injuries provide a discovery rule for at least one of these diseases.[445] Such a distinction for one kind of delayed-manfestation disease, which commonly applies to disease resulting from radiation exposure, serves no important state objective. Thus, an arbitrary result can occur depending on what type of occupational injury the worker develops. Because the workers' compensation statutes are meant to provide comprehensive compensation for workplace injuries, denying compensation because one develops the "wrong" kind of occupational disease appears capricious. In addition, it seems arbitrary to distinguish between employees who develop the same disease from the same initial exposure by allowing compensation only to those who develop symptoms or who become disabled sooner. There also seems little rational basis to distinguish between two workers who develop the same disease at the same time by permitting recovery only to those who remained in the hazardous employment for a longer period.

Another distinction in workers' compensation statutes that can be challenged is allowing compensation to those injured by accident, but not to those injured over time by slowly developing diseases, even though both injuries are workplace-related.[446] Using similar reasoning, New Hampshire overturned its product liability repose statute, concluding that distinctions made between plaintiffs injured by products and those injured by other means were unconstitutional.[447]

A final distinction that is subject to challenge is based on the protection of certain types of employers. Statutes that effectively bar claims based on delayed-manifestation diseases arguably insulate from liability only employers who use products that cause slowly-developing injuries. The Rhode Island[448] and Alabama[449] courts concluded that the statutory

444. *See, e.g.*, Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288, 195 (1983); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984).

445. *See* Summary Chart in the Appendix.

446. *See, e.g.*, ALA. CODE § 25-5-147 (1977 & Supp. 1984); GA. CODE ANN. § 34-9-281 (1983); IDAHO CODE § 72-448(1) (Supp. 1984); IOWA CODE § 85A.12 (Supp. 1984); KAN. STAT. ANN. § 44.5901(c) (1982); VT. STAT. ANN. tit. 21, § 1006 (1978).

447. Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288, 295 (1983).

448. Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984).

distinction between manufacturers of long-lived as opposed to short-lived products was arbitrary.

While ample precedent exists for overturning restrictive worker compensation statutes, some state courts have not been persuaded. As exemplified by Bunker's case and others mentioned above,[450] some courts find other factors more persuasive or apply a rational basis test, rather than a heightened review, to the limitation statute out of a policy of deference to the legislature.

In predicting how state courts will respond when faced with challenges to restrictive occupational disease limitations, perhaps the best indicator is the state's policy on other restrictive time limitations. Although as many states have enacted restrictive product liability statutes of repose[451] as have enacted restrictive worker compensation limitations,[452] the overlap between the two is not high. Only nine states with product liability repose statutes also have restrictive worker compensation limitations.[453] Of these nine, two, Alabama and North Carolina, have declared their state's product liability repose statutes unconstitutional.[454] In addition, Illinois has restricted its product liability repose statute to strict liablity actions.[455] Nebraska recently has stated that its medical malpractice statute of repose is not a complete bar,[456] and Ne-

449. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1004 (Ala. 1982) (Torbert, C.J., concurring).

450. *See e.g. supra* text accompanying notes 65-71, 313-15.

451. *See supra* notes 419-20.

452. *See* Summary Chart in the Appendix (under headings of Last Exposure, Minimum Exposure, and Last Employment).

453. Those states are Alabama, Georgia, Idaho, Illinois, Indiana, Kansas, Nebraska, North Carolina, and Utah.

454. Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982); Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 293 S.E.2d 415 (N.C. 1982).

Alabama also has enacted a statute which begins accrual for civil actions resulting from exposure to asbestos on the first date the plaintiff should have reason to discover the injury. ALA. CODE § 6-2-30(b) (Supp. 1984); *see supra* note 89.

455. Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981). Illinois has also held its statute should not be applied retroactively. Blazer v. Inland Steel Co., 100 Ill. App. 3d 1071 (1981). The Illinois architect and builder statute of repose was held unconstitutional in Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

The Kansas product liability statute also does not completely bar suit; it merely creates a presumption that after 10 years the harm was caused after the useful safe life of the product had expired. KAN. STAT. ANN. § 60-3301 (1981). This statutory presumption was interpreted to be substantive, and therefore inapplicable retroactively. Chamberlain v. Schmutz Mfg. Co., 532 F. Supp. 588 (D. Kan. 1982).

456. Sacchi v. Blodig, 215 Neb. 817, 341 N.W.2d 326 (1983). In *Sacchi*, the plaintiff was hospitalized in 1967 for treatment of depression. In 1980 he sued his treating physician for negligent misdiagnosis. Plaintiff asserted that his suit should not be barred by the state's 10-

vada has overturned its architect and builders' repose statute.[457] Thus, in several states the courts seem willing to entertain arguments regarding the unconstitutionality or undesirability of cutting off claims before the sufferer is even aware that an injury has occurred.[458] On the other hand, other states, like Indiana, seemingly will continue to allow workers to be denied compensation if they develop delayed-manifestation occupational diseases which fail to lead to disability within two or three years of the worker's last exposure to an injurious hazard.[459]

The Objectives of Workers' Compensation: Is There a Need for Greater Uniformity and Coordination?

The Roots of Workers' Compensation Statutes

In the nineteenth century, the prevailing American view was that workers assumed those ordinary and extraordinary risks of industrial injury for which they had notice.[460] They were free to pursue their com-

year repose statute because he did not discover the negligence until his mental incompetency was removed. The court found that the repose statute was not meant to be absolute and unconditional, and allowed the claim.

Georgia recently held that the two-year statute of limitations for medical malpractice actions, which runs from the time of the negligent or wrongful act or omission, could not be applied to bar a wrongful death action in which the alleged malpractice occurred June 3, 1978, death occurred June 11, 1979, and suit was filed June 8, 1981. The court stated that to allow such application would create two classes of wrongful death claimants in medical malpractice actions, and bar actions for one class before they accrue. Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983).

457. State Farm Fire & Casualty Co. v. All Elec., Inc., 660 P.2d 995 (Nev. 1983).

458. Other states with restrictive occupational disease time limitations have overturned their medical malpractice reform statutes because they put unreasonable barriers in the way of plaintiff's suit. *See, e.g.*, Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); State *ex rel.* Cardinal Glennon Memorial Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (en banc); Linder v. Smith, 629 P.2d 1187 (Mont. 1981); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980).

459. Indiana's repose statutes have been upheld against all attacks. *See, e.g.*, Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983) (product liability); Pitts v. Unarco Indus., Inc., 712 F.2d 276 (7th Cir.) (wrongful death claim barred by 10-year product liability repose statute), *cert. denied*, 104 S. Ct. 509 (1983); Tolen v. A.H. Robins Co., PROD. LIAB. REP. (CCH) ¶ 10,117 (N.D. Ind. 1984); Beecher v. White, 447 N.E.2d 622 (Ind. App. 1983) (architect and builder's repose statute).

460. *See, e.g.*, Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 331-32, 27 N.E. 741, 743 (1891):

> The law is well settled that a servant assumes all of the ordinary and usual risks of the business upon which he enters, so far as these risks are known to him, or could be readily discernable . . . in the exercise of ordinary care . . . . It is also settled law that . . . the employe [sic] who voluntarily continues in the master's service after notice of defects in tools, machinery, or other appliances . . . thereby assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect.

mon-law remedies only if they fell victim to unexpected events caused by the negligence of their employers. Besides assumption of risk, employers had available to them two other complete common-law defenses: the contributory negligence of the plaintiff and the fellow servant doctrine.[461] In addition, wrongful death actions were not available for much of the century,[462] and many personal injury cases were decided as matters of law, effectively averting the tendency of sympathetic juries to ignore legalistic barriers to recovery.[463]

Thus, the economic development of the North American continent claimed the lives, limbs, and health of an incredible number of workmen.[464] Yet, the increasing urbanization and industrialization that it brought swelled the ranks of the American working class, and with its greater numbers came political power.[465] This power brought changes in the law. Wrongful death statutes[466] and health and safety regulations were enacted by legislatures;[467] plaintiff-oriented rules, such as the last clear chance doctrine,[468] res ipsa loquitur,[469] the vice-principal doctrine,[470] and negligence per se,[471] were adopted by common law courts. Above all, more cases were sent to juries, so that in the first decade of the twentieth century a substantial number of injured workmen, or their survivors, were recovering in negligence actions against employers.[472] Then as now, however, the tort system was viewed as an uncertain and expensive path to compensation.[473]

The presumption that employees were compensated for the known

461. *See generally* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 412-13 (1973); B. SCHWARTZ, THE LAW IN AMERICA 58-59, 123 (1974); G. WHITE, TORT LAW IN AMERICA 38-56 (1980).

462. L. FRIEDMAN, *supra* note 461, at 415.

463. *Id.* at 417. *See* G. WHITE, *supra* note 461, at 57-58. White points out that nineteenth century legal scholars practicing 'legal science' sought to distill certain rules of negligence law from recurring fact situations. They believed that judicial application of such "rules" would make a jury determination unnecessary. For example, scholars proposed that in railroad crossing cases plaintiffs would be contributorily negligent as a matter of law if they failed to stop, look, or listen. *Id.* at 57.

464. "At the turn of the century, industrial accidents were claiming about 35,000 lives a year, and inflicting close to 2,000,000 injuries." L. FRIEDMAN, *supra* note 461, at 422.

465. *Id.* at 426-27.

466. *See id.* at 421-22.

467. *Id.* at 419-21.

468. *Id.* at 418; G. WHITE, *supra* note 461, at 45-50.

469. L. FRIEDMAN, *supra* note 461, at 418-19.

470. *Id.* at 423-24; G. WHITE, *supra* note 461, at 51-55.

471. L. FRIEDMAN, *supra* note 461, at 421.

472. *Id.* at 423.

473. *Id.* at 425.

risks they incurred by adjustment of their wage rates[474] was a particularly unrealistic, inhumane, and inefficient principle for governing the distribution of costs attributable to work-related accidents and health impairments. The concept rested on several dubious assumptions: first, that notice of risk to workers allowed them to determine accurately the probability and severity of harm that was threatened;[475] second, that there was roughly equal bargaining power between employer and employee;[476] third, that whatever risk premium employees received as part of their wages would be used to purchase insurance or some other buffer against catastrophe;[477] and fourth, if no insurance or savings were avail-

474. *See* Farwell v. Boston & Worcester R.R. Corp., 45 Mass. (4 Met.) 49, 57 (1842):

> The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly.

475. Economists have not yet been able to determine empirically whether workers overestimate or underestimate the actuarial risks they face. There is, however, some evidence that workers as a group systematically underestimate employment dangers. *See* Akerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982). Akerlof and Dickens describe "[a] great deal of anecdotal information [which] suggests that workers in dangerous jobs are often quite oblivious to the dangers that are involved." *Id.* They suggest that the cause of the underestimation may be found in the hiring process. *Id.* The workers who underestimate are the ones who take the hazardous jobs as being "a good deal" and thus skew the makeup of the workforce at risk. The authors also advance the theory of cognitive dissonance, under which workers who have already opted for the hazardous employment tend to ignore or disbelieve evidence of job risks because these workers refuse to admit to themselves that they have erred. *Id.* at 308-10. For a review of the cognitive dissonance theory, see Rea, *Workmens' Compensation and Occupational Safety Under Imperfect Information*, 71 AM. ECON. REV. 80 (1981). Not all economists, however, subscribe to this theory. *See* W. VISCUSI, EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE 239 (1979).

476. If equality of bargaining power is an economic concept, it is not easily quantifiable. Yet, the nineteenth century "will theory" of contract formation assumed that both parties negotiating a price for a commodity or service had reasonable alternatives due to a fairly robust market for the subject matter of the transaction. Heavy immigration and slower growth in the latter part of the past century, however, so depressed the price of American labor that workers were bitterly disappointed with the bargains they were able to strike with employers in individual negotiations. As a result, "[i]n the [post-civil] war years, a trade-union movement grew rapidly—as rapidly perhaps as industrial combination." L. FRIEDMAN, *supra* note 461, at 485. This unionization was accompanied by unprecedented levels of violence. *Id.* at 485-86. Deep worker dissatisfaction with the laissez faire bargaining process for employment strongly suggests that the will theory's fundamental assumption of equal bargaining power was incorrect.

477. "In practice, however, many workers will prefer current consumption over protection and will demand the risk premium in cash. If they are injured on the job later, both they and society suffer." NATIONAL COMMISSION ON STATE WORKMENS' COMPENSATION LAWS, COMPENDIUM ON WORKERS' COMPENSATION 23 (1973) [hereinafter cited as COMPENDIUM]. The Compendium authors also argue that "[i]n a perfectly competitive economy in which

able or sufficient to bear the costs of injury, those costs would nevertheless come to rest only on the injured workers or on their immediate families.[478] The reality, however, increasingly came to be that, as medical science improved, disabled workers lived for longer periods as incapacitated charity cases supported by their employers' largesse, church and private philanthropy, and eventually governmental institutions.[479] And when workers finally died, spouses and children still required support.

Despite the increasing opportunity for injured workers actually to prevail in negligence suits against their employers,[480] the delay, uncertainty, and costs of the tort system devastated worker and employer alike.[481] The profitless dispute over the fault issue was a particular source of displeasure to employers.[482]

In this environment reform groups, supported at first only by business interests, sought a comprehensive system to meet the legitimate needs of injured workers and the desires of employers to allocate the basic costs of industrial injury in a businesslike way without regard to fault.[483] European models of worker compensation legislation were examined, and finally, with organized labor's belated blessing, were enacted in this country,[484] but on a state by state basis.[485]

Uniformity in Workers' Compensation Law

This Article has demonstrated that the current state systems vary considerably, not merely in degree, but also in the fundamental approach

employees perceived accurately the hazard differentials among various occupations, employees would demand a risk premium in their wages that would substantially exceed their expected or average losses in the long run." *Id.* The authors conclude, however, that "[p]erfect perception of occupational hazards and a perfectly competitive labor market are also unrealistic assumptions." *Id.*

478. The cost of industrial accidents was to be shifted from the entrepreneur to the workers themselves. Insofar as there was any responsibility toward destitute workers and their families, society as a whole, through its poor laws, would bear the burden, rather than leaving it to the most productive sector of the economy.

L. FRIEDMAN, *supra* note 461, at 414.

479. *See id.* at 428-34.

480. *Id.* at 423; COMPENDIUM, *supra* note 477, at 17 (quoting Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972)).

481. L. FRIEDMAN, *supra* note 461, at 425.

482. COMPENDIUM, *supra* note 477, at 14.

483. *Id.* at 16.

484. *Id.* at 16-17.

485. A federal statute was enacted in 1908 at President Roosevelt's urging but only to cover "certain Federal employees." *Id.* at 17. From the beginning, the regulation of health and safety of employees in the private sector was considered appropriate for state legislation under state police powers, rather than a matter of interstate commerce.

they take to the problem of compensation. A short and fixed limitation period,[486] for example, represents a more conservative philosophy than does a discovery rule which begins to count only when claimants learn the true relationship of their disabilities to their employment.[487]

These state disparities compel the question whether the objectives sought by the enactment of the original workers' compensation statutes require more state uniformity than exists today. We first observe that certain of the system objectives appear to be in tension. On the one hand, workers' compensation seeks to address the economic needs of injured workers: the humanitarian objective of the system; on the other hand, the system seeks to allocate work-related health and accident costs efficiently within an actuarily sound insurance mechanism: the system's efficiency objective.[488] The successful realization of both objectives is interdependent. Setting the proper balance between these goals is an essential task for the system designer, the state legislature.[489] Legislatures, administrative tribunals, and courts must realize the importance of both objectives: the humane and the efficient. Employees who suffer employment-related injury from incalculable risks should increasingly find relief in their workers' compensation programs as earlier, uncertain risks become calculable.[490] But demands for that relief must also be contained

486. *See supra* notes 85-292 & accompanying text.

487. *See supra* notes 293-310 & accompanying text.

488. One authority lists five system objectives: "(l) income replacement, (2) restoration of earning capacity and return to productive employment, (3) industrial accident prevention and reduction, (4) proper allocation of costs, and (5) achievement of the other four objectives in the most efficient manner possible." COMPENDIUM, *supra* note 477, at 24. Of these five, the first two and the last two are included in either the "humanitarian" or "efficiency" goals referred to in the text. Objective three, however, the "prevention and deterrent" objective, can be viewed as a by-product of the others. If the needs of injured workers are met and the costs of doing so are properly allocated, then incentives for reducing aggregate injury costs will flow from market forces. This result will obtain, however, only if there is a free flow of adequate information to those parties—workers and employers—who can take remedial action.

489. Legislatures must seek to meet worker needs without removing incentives for workers to avoid injuries, to enable injured workers to rehabilitate themselves to the maximum extent, and to enable them to return to the workforce as soon as possible. Legislatures must also strive not to assign an industry or activity more than its appropriate share of injury costs so that its productivity and output will not be overly restricted. For these reasons, the workers' compensation system has several built-in limitations, including wage replacement of less than full take-home pay, waiting periods for compensation, and statutory maximum benefits. The wide variation among state limitation provisions indicates that solutions to system design problems are not easily calculated.

490. Workers' compensation depends on actuarial probabilities for its predictability. Some critics argue that highly speculative risks should be excluded. Yet once the probability and severity of injury become actuarially predictable, these risks should be included within the system even if the projected costs are high. Legislators, however, should carefully phase in earlier incurred costs to avoid burdening current enterprises for practices that were justifiable

and limited to protect the system from great actuarial unpredictability and unreasonable benefit levels, forces that could inundate and bankrupt the programs.[491]

At first glance, there is no compelling reason why each jurisdiction should not establish its own balance. The interests involved—workers' health and welfare and the productivity of the plants in which they work—traditionally have been controlled by state law. While employers are influenced in their plant location and expansion decisions by matters such as state workers' compensation insurance premium levels,[492] reasonable constraints on the uncontrolled growth in workers' compensation benefit levels resulting from the states' vigorous competition for jobs is not an entirely unwelcome by-product of state, rather than federal, administration.[493]

Nevertheless, the need to coordinate with other compensation systems may ultimately overwhelm the traditional assignment to state law of the task of administering workers' compensation. Workers' compensation is only one of several mechanisms that offer potential relief for employees who suffer physical harm caused by workplace hazards. Private medical insurance plans, private disability and retirement plans, and Social Security disability are alternative sources of financial support. The various welfare systems, as well as informal employer wage and salary maintenance policies, provide important additional support systems. Coordinating these mechanisms leads to some problems, which for the most part are manageable because it is generally acknowledged that if injury arises out of and in the course of employment, the workers' compensation insurance should pay the bills.[494] These other support mechanisms are activated only if the claim is not work related, or if the state workers'

in a previous legal, commercial, and ethical environment. For example, unless a legislature develops a funding scheme to externalize part of the costs of asbestosis, an attempt to saddle the contemporary asbestos industry with the full cost of asbestos-related diseases incurred from exposures 20 to 40 years ago will prove counterproductive.

491. The affordability of recent liberalizing trends in state workers' compensation administration was addressed at a national conference in 1981. *See* Panel Discussion, *Workers' Compensation Viewed From the State Level*, in FINAL EDITED PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKERS' COMPENSATION AND WORKPLACE LIABILITY 100-59 (1981).

492. *See supra* note 17 & accompanying text.

493. For critiques of the three workers' compensation systems administered by the federal government, see *An Examination of Federal Workers' Compensation Programs, Including Longshoremen's and Harbor Workers' Compensation Act, The Black Lung Benefits Act, and the Federal Employees' Compensation Act*, in FINAL EDITED PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 161-259 (1981).

494. This assumes that the workers' compensation system benefits and coverage in the jurisdiction are reasonably adequate. Where benefits are inadequate, augmenting legislation might have to be encouraged. *See infra* notes 529-32 & accompanying text.

compensation benefits prove clearly inadequate.[495] As administrative tribunals, courts, and legislatures expand the scope of a compensable injury under workers' compensation, the importance of the alternative compensation mechanisms should diminish.

The tort system has once again become an important potential source of relief for the injured worker.[496] Now, however, the tort defendants generally are not employers, but are third parties, usually manufacturers of allegedly dangerous, defective workplace products which cause injury.[497] Coordinating these third party actions with workers' compensation claims poses greater difficulties.

The foremost problem presented by extensive reliance on the tort recovery in the workplace context is tort law's inefficiency[498] and uncertainty.[499] In a tort action the parties battle over full compensation and special damages, often several times the plaintiff's economic losses. Both sides are motivated to mount expensive legal campaigns, which fre-

495. This is not always the case: "workers' compensation has not been nearly rigorous enough in eliminating payments which duplicate other payments from collateral sources, whether of a governmental or private nature—whether Social Security or private pensions or accident and health insurance." O'Connell, *Broadening the No-Fault Compensation Option*, in FINAL EDITED PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 262 (1981).

496. The "sole remedy" principle has exceptions known as the intentional injury doctrine, *see, e.g.*, Johns Manville Prods. Corp. v. Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), and the dual capacity doctrine, *see, e.g.*, Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977); Knitz v. Minster Mach. Co., 69 Ohio St. 2d. 460, 432 N.E.2d 814 (1982). *See* Birnbaum, *Inroads in the Immunity Shield: Employee Tort Action Against Employers*, in FINAL EDITED PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 142 (1981). Birnbaum concluded that neither doctrine had caused severe compensation. *Id.* at 147. More recently, Professor Birnbaum published a less sanguine report. Birnbaum, *Worker Compensation Exclusivity Undermined by Ohio Decision*, Nat'l L.J., May 31, 1982, at 17, col. 1.

497. Common-law actions by injured workers against third party tortfeasors are generally permitted. The employer receives a lien against compensation benefit payments. If the worker does not bring a third party action, the employer or the compensation carrier can usually bring a direct or subrogation action against the product manufacturer. *See, e.g.*, IND. CODE § 22-3-2-13 (1982).

498. *See supra* note 401 & accompanying text.

499. This, then is the present tort insurance system:

> not a system for paying accident victims from accident insurance (as sensible as that simple idea would seem to be), but a system for *fighting* accident victims about paying them from accident insurance; a system so cumbersome and tricky that the typical accident victim, even after consulting a lawyer . . . cannot know *what* he will be paid, *when* he will be paid, or *if* he will be paid; a system hugely wasteful . . .; a dilatory system . . . with the outcome more dependent on luck and emotion than on need and reason.

J. O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES 54 (1975) (emphasis in original).

quently after years of litigation leave plaintiffs empty-handed and defendants with either devastating defeats or costly "victories." If the resources dedicated to the relatively few but generally large tort judgments and settlements, and their attendant transaction costs, could be reallocated on a no-fault basis to greater numbers of injured workers, the cost-effectiveness of the compensation process certainly would be improved. Several commentators advocate increasing workers' compensation benefits as a quid pro quo for making it the sole remedy available to the injured worker.[500] But whether one is philosophically for or against such a "reform," the pressures of international competition ultimately may force efficiencies in American compensation policies. American producers cannot continue to carry product liability insurance costs running substantially higher than what competitive foreign producers pay.[501] For workplace products, one solution is greater use of the more efficient compensation delivery system: workers' compensation.[502]

One precondition for blending the tort and workers' compensation systems, however, is greater uniformity and internal coordination of each system than now exists. For example, workplace product manufacturers might be required to contribute the equivalent of their product liability insurance premiums to a reformed and augmented workers' compensation program.[503] The administration of this interaction would be compli-

500. *See id.*; U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT VII 103 (1978) [hereinafter cited as FINAL REPORT].

501. *See* Fuchs, *Product Liability and International Trade*, in EDITED PROCEEDINGS CONFERENCE PRODUCT LIABILITY TORT LAW REFORM 149 (1982). "The fact that the [European] product liability insurance premium limits are lower is a direct consequence of the fact that damages awarded are generally much smaller in Europe than the U.S.A." *Id.* at 149. "The difference in rates between [the] U.S. . . . and Europe . . . is hard to estimate, but one can say that for Europe we are talking about fractions of per mil or per thousand [of sales], while in the U.S. we are now working with fractions of percent or percent." *Id.* at 151.

Another writer points out that greater liability exposure in the U.S. need not result in a comparative advantage for foreign manufacturers because they will purchase coverage equal to their American competitors. As for Americans who export to Europe, he concedes that they "will be carrying a heavier burden than competitors overseas . . . . [b]ut . . . once they develop sufficient trade to have a separate insurance program, the costs will be comparable with those of competitors overseas." Marriott, *Product Liability and International Trade*, in EDITED PROCEEDINGS CONFERENCE PRODUCT LIABILITY TORT LAW REFORM 152, 154 (1982). In the short run, however, the higher domestic product liability exposure will hinder the development and initial penetration of American products, while lower foreign rates shelter the development of the foreign competitors and their products. Some American products may disappear altogether, leaving the American market to foreign manufacturers. One example was reported by Robert Muth, Executive Vice-President of ASARCO, Inc.: "Today the U.S. market [for ASARCO's need] is supplied solely from foreign sources, and at prices 600% above that which previously prevailed." *Id.* at 146.

502. *See supra* notes 402, 405 & accompanying text.

503. *See* FINAL REPORT, *supra* note 500, at 103-13. The authors discuss two schemes

cated by the great variety of standards, benefit schedules, and limitations that now exist. Allocating this product manufacturer's contribution to fifty different state programs would be an administrative nightmare.

The possibility of federal preemption of product liability law makes this sole remedy scheme less than visionary.[504] The proposal for a federal product liability act has some strong bipartisan support.[505] The Kasten bill,[506] currently under consideration in the Senate,[507] would

under which workplace manufacturers would contribute to the workers' compensation system. The first is a "pre-accident," taxlike contribution to state funds in exchange for immunity for third party tort suits. The second scheme calls for a contribution from the product manufacturers after the accident or health impairment has occurred. An arbitration proceeding will determine the contribution and the employer can recover indemnification or contribution. *Id.* at 110-11. The pre-accident scheme raises two problems. First, if such a scheme is adopted one state at a time, resale of products across state lines may be ineffective in shielding employers who contributed in only the first state. Second, a manufacturer's incentive to strive for safety may be reduced because its contribution to the fund would be based on sales and not "the number and extent of injuries caused by his product." *Id.* The proposed post-accident arbitration proceeding, however, would include some of the transaction costs of the present tort system.

The sole remedy scheme is sensible and can be legislated nationally without federalizing the workers' compensation system. The "pre-accident contribution" concept is workable under a national product liability statute. Employers would act as better "gatekeepers" and provide the incentive to manufacturers to market safe workplace products. They would purchase safer workplace products because the quid pro quo for worker acceptance of the loss of common-law rights would be an augmented workers' compensation system with higher workers' compensation premiums. The authors of FINAL REPORT noted concern that an augmented system with higher benefits in a state with already generous benefits may encourage fraud and malingering. FINAL REPORT, *supra* note 500, at 105. But greater allocation of resources to workers' compensation systems need not translate into greater weekly wage benefits. Better rehabilitation programs and better medical treatment are alternative uses of such resources that will not encourage fraud or malingering. Increasing the maximum number of weeks of benefits is another quid pro quo with less chance for abuse.

Although less desirable, the employer's arbitration proceeding for indemnity is also feasible. The chances of achieving minimal transaction costs are excellent with no contingency fees, much lower stakes per dispute, arbitration rather than litigation, and insurance companies as adversaries on both sides.

504. *See Business Bulletin*, Wall St. J., May 17, 1984, at 1, col. 5 (predicting that "[a] Federal Law on product liability is likely to be adopted this year").

505. The Democratic Chairman of the House of Representatives Energy & Commerce Subcommittee on Health and the Environment stated: "I believe that a balanced Federal Uniform Product Liability Act is needed. The current patchwork of 50 different state laws on product liability causes confusion, conflict and unnecessary costs for everyone concerned." Banquet Keynote Speech by Rep. Henry A. Waxman, in EDITED PROCEEDINGS PRODUCT LIABILITY TORT LAW REFORM 35 (1982). President Reagan, in his 1984 annual report to Congress on the state of small business, called for federal legislation to deal with products liability problems. *President Asks Products Liability Reform*, 2 PROD. LIAB. REP. (CCH) No. 541 at 9 (Mar. 26, 1984).

506. S. 44, 98th Cong., 1st Sess. (1982).

507. The bill cleared the Senate Commerce Committee in late March 1984. Miller, *Drawing Limits on Liability*, Wall St. J., April 4, 1984, at 26, col. 4.

eliminate the employer's subrogation lien against an employee's product liability judgment.[508] Although the provision purports merely to separate the two systems,[509] it would channel more claims through workers' compensation, rather than through both systems.[510] Claimants who opt for both a tort remedy and workers' compensation benefits would receive, if they are successful, their full workers' compensation recovery from their employer and only the balance of their judgment from the third party tortfeasor.[511]

Eliminating the employer's lien should restore much of the relative importance of workers' compensation vis-a-vis the tort system. Another desirable result of such a rule would be that employers will be motivated to act as gatekeepers to control more effectively the introduction and use of dangerous products in the workplace.[512] Yet another rationale for improved coordination is that it may lead to the eventual elimination of workplace tort claims altogether, while funding improved benefits through workplace product manufacturers' contributions to the workers' compensation system.

If greater uniformity, and perhaps federalization, of workers' compensation standards[513] is forthcoming, what effect should this have on occupational disease statutes of limitation? Given the twin objectives of

508. S. 2631, 97th Cong. 2d Sess., § 11(b) (1982) (S. 2631 was reintroduced as S. 44 in the 98th Cong.); *see supra* note 506.

509. S. REP. No. 670, 97th Cong., 2d Sess. 46, *reprinted* in Prod. LIAB. REP. (CCH) No. 507 (Dec. 15, 1982).

510. Under present law, the employer's workers' compensation carrier is motivated to recover its payment of workers' compensation benefits from the manufacturer of the defective workplace product. Eliminating the employer's lien removes the incentive for the employer or insurer to bring direct or subrogation actions. One report found that 63.5% of bodily injury product liability claims (representing 68.5% of total judgments or settlements) were filed by workers' compensation carriers or employers. INSURANCE SERVICES OFFICE PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 64 (1977). Without subrogation, far fewer claims would go beyond workers' compensation. Some employers oppose this provision. *The Fight Over Product Liability Law*, NATION'S BUSINESS 54 (November 1983).

511. Nothing in the pending legislation would preclude third party actions by an employee. Even so, without carriers and employers to file these claims, employee ignorance and higher friction costs will likely eliminate many viable product liability actions.

512. Increasing the employer's exposure to liability while reducing that of third party manufacturers will probably improve safety and health levels. Among the worker, employer, and workplace product manufacturer, it is the employer who has most control of the workplace safety environment. The employer hires, trains, sensitizes, supervises, selects the tools and material, sets the rates, provides the first aid, disciplines the safety rule violator, maintains the equipment, and updates the safety and health system. Although not absolutely in command of all accident and health factors, the employer is still properly the primary obligor.

513. *See infra* notes 529-30 & accompanying text. We neither favor federalization nor do we think its adoption is soon likely.

humanitarianism and efficient allocation of resources, a limitations policy should seek to include the maximum number of bona fide claims for work-related health impairments under the workers' compensation umbrella. Enactment of a discovery rule, a realistically long last exposure rule, or some effective combination of the two, would be consistent with that goal.[514]

Conclusions and Recommendations

Although the states have undergone a dramatic and accelerating shift from restrictive limitation provisions to more liberal discovery rules, in a substantial number of jurisdictions concerns over unmanageable costs, problems with multiple causation, and fears of encouraging fraud and malingering have inhibited both legislative and judicial actions to broaden the scope of worker recovery under state occupational disease acts.[515] These concerns are legitimate. Yet, there is a powerful consensus that all workers who suffer injury or health impairments arising from employment hazards should be compensated.[516] Despite the difficulties, the no-fault workers' compensation approach offers the best opportunity for allocating the appropriate costs to the enterprises which generate them.[517] Limitation provisions that bar otherwise meritorious workers' compensation claims shift those costs to systems and parties that are ill-equipped to bear them. In addition, this shift shelters hazardous industries from worker compensation expenses, thus providing those industries with subsidies that arguably lead to the inefficient allocation of economic resources.[518]

What is the appropriate governmental response when a jurisdiction has not expanded the scope of its workers' compensation coverage as fast

514. Either of these provisions would shift cases from the tort, welfare, hospitalization insurance, and Social Security systems to workers' compensation.

515. *See supra* notes 85-292 & accompanying text. Nineteen states would probably bar the *Bunker*-type claimant: Alabama, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Utah, and Vermont.

516. The best support for this conclusion is the increasing potential for recovery under the provisions of the workers' compensation system and through the other compensation mechanisms discussed in this Article. Without a supporting consensus, legislatures and courts would not be facilitating recovery. *See* Hollenshead, *Can the Compensation System Cope with Occupational Diseases: An Overview of Recent Legal Developments*, in FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 341, 351 (1981).

517. *See supra* note 503 & accompanying text.

518. If market forces lead to maximum economic efficiency, then intervention, *e.g.*, subsidies, will distort the conduct of the economic actors. For example, if the true cost of producing toxic substances is externalized, the price of these substances will be reduced and more will

as medical knowledge and fiscal prudence would deem appropriate? State courts, of course, may address the problem under equal protection and due process principles. As discussed above, some courts have accepted these arguments to strike down limitation provisions in contexts other than workers' compensation, while other courts have declined to do so in similar situations.[519] The lack of judicial agreement on the application of these constitutional principles to statutes of limitation may discourage such challenges. Perhaps it is time for the Supreme Court to grant certiorari in one of the many cases involving claimants who have been barred by limitation or repose statutes before they can discover their injuries, or even before they are injured. Whether such claimants are entitled by general due process principles to a remedy is a matter that should be settled at the highest level.[520]

Another reason for greater uniformity in workers' compensation law is the problem of coordination with the other compensation mechanisms.[521] Achieving such uniformity and coordination, however, is not a task for the judiciary. The impact of delayed manifestation occupational diseases on our health support systems makes the need for substantial legislative overhaul increasingly apparent.

We make the following recommendations: First, the controlling law problem should be settled explicitly by statute in each jurisdiction, using the date of the claimant's disability to determine the law that applies.[522] Moreover, although we also favor the date of disability to commence the period within which a claim must be filed, the imposition of some definite statutory outer cutoff is also recommended.[523] Because workers' com-

be produced than if the producers involved were required to absorb and/or pass through these costs.

The short term effects on one country's industry when another country subsidizes production of a hazardous product is beyond the scope of this Article.

519. *See supra* notes 400-59 & accompanying text.

520. *See, e.g.*, Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983). In *Braswell*, the plaintiffs brought a product liability action against an asbestos manufacturer for personal injury. Relying on *Bunker*, the court ruled that, under Indiana law, a cause of action accrues no later than the date of last exposure to asbestos even though no symptoms have emerged, or will emerge, during the two years that the tort statute of limitations has to run. In their petition to the United States Supreme Court for certiorari, the plaintiffs argued that the case should have been certified to the Indiana Supreme Court. "Further, they contend[ed] that the decision violates the due process and equal protection clauses because those who suffer from injuries with a long latent period are treated differently from those whose injuries are immediate." *Asbestos Workers Attack Court's Failure to Certify Issue*, 2 PROD. LIAB. REP. (CCH) No. 544, at 1 (May 4, 1984).

521. *See supra* notes 460-514 & accompanying text.

522. *See supra* notes 379-404 & accompanying text.

523. It may seem politically unrealistic to propose the imposition of a more restrictive limitation than some jurisdictions now have, but Florida's experience shows that room for

pensation is an insurance concept and a social support mechanism, both of which are based on reasonable predictability, we recommend a bifurcated cutoff provision, preferably for all occupational diseases, such as: forty years from the first employment in which the hazard exists, or ten years from last employment, whichever period is most favorable to the claimant. These times are definite and encompass the majority of meritorious claimants, but will prevent the system from becoming completely open-ended.[524] Furthermore, claimants should be required to notify their employer when they have reason to believe that they may become disabled at some future time.[525] Such notice should be excusable for good cause and should also suffice to toll the outer cutoff limitations if early symptoms do in fact ripen into disabling occupational disease.[526]

Knowledge of the occupational origin of a disability should not be necessary to commence a limitation period. Although symptoms are sometimes misinterpreted and diseases are misdiagnosed, the moment when actual or constructive knowledge of the occupational relationship

political "horse trading" may exist in workers' compensation system revisions. The Florida legislature enacted "reform" legislation which more closely tied workers' compensation benefits to actual wage loss, rather than to arbitrary permanent partial disability awards. Wage loss benefit percentages were raised in Florida, but abusive "wash outs" of partial impairment cases were placed under tighter control. As a result, litigation was significantly diminished and insurance premiums were correspondingly reduced. *See* J. INMAN, WAGE-LOSS IN FLORIDA, WORKERS' COMPENSATION: PERSPECTIVE FOR THE EIGHTIES 67-76 (Society of Chartered Property & Casualty Underwriters Monograph Fall 1981.)

524. The Oregon statute, OR. REV. STAT. § 656.807(4) (1981), has a 40 year limitation period that runs from the claimant's last exposure to asbestos. In addition to this limitation, the claimant must file within 180 days of disablement, or within 180 days of learning of the nature of the disease, if that knowledge comes after disablement. *See supra* notes 365-73 & accompanying text. Both the Oregon law and the discovery rule laws may create a large class of elderly claimants, who file *new* claims even though they may not have worked in decades. For example, an asbestos worker who began working with asbestos at age 20, and was last exposed at 50, could conceivably first bring a compensable claim in Oregon for medical expenses when he is in his late 80's. Health problems of the elderly are usually bound up with a multitude of possible causes; these cases are probably best dealt with by social support mechanisms unrelated to employment.

At a December 1984 meeting of The National Association of Insurance Commissioners (NAIC), NAIC's occupational disease advisory committee unveiled a proposal which called for workers' compensation statutes to run "from a current event, such as date of disability or the date the worker knew or should have known of the disabling condition and its relationship to employment." Diamond, *Workers' Comp Proposal Winning Board Support*, NATIONAL UNDERWRITER, Dec. 28, 1984, at 1.

525. Some objective evidence, such as tentative medical diagnosis, should be required before notice would be effective.

526. One of the harshest effects of many of the last exposure laws is the bar to claims by an employee who knows he is developing an irreversible occupationally related disease, but is not disabled until after the statute of limitations has run.

occurs is difficult to fix.[527] In the interest of certainty, the basic claim filing limitation should run from date of disability, providing a generous period for discovering the occupational relationship; a period two to five years following disability would be reasonable. The notice provision suggested above will protect those claimants who prior to their disablement have good reason to suspect an employment-related cause for their symptoms.

Claimants must bear the burden of showing that their injuries arose in and out of the course of their employment. We endorse a minimum exposure presumption to assist the administrative determination of the occupational relationship to their health impairments, but we believe that the presumption should favor the claimant, not the employer.[528] For example, two or more years exposure to an occupational disease hazard, coupled with a medical diagnosis that the claimant has the specified disease, should establish a presumption of a relationship between the disease and the occupation.

Although we do not favor the federalization of workers' compensation, uniformity in state law provisions such as statutes of limitation should be encouraged. Recommendations of the National Commission on State Workmen's Compensation Laws[529] led in the 1970's to greater

527. *See, e.g.*, Stone v. State Accident Ins. Fund Corp., 57 Or. App. 808, 646 P.2d 668 (1982). In *Stone* the claimant was examined by a physician who filed a diagnosis of asbestosis. Because there was no evidence that the physician informed the claimant of the diagnosis, it was necessary for the referee to ascertain the moment at which the claimant first had knowledge over seven months later.

528. *See supra* notes 378-79 & accompanying text. Presumptions favoring the claimant have been used extensively in federal "black lung" legislation. *See* Strader & Sheehe, *Federal Black Lung: Ten Years of Legislation & Litigation*, in FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 204, 206 (1981). The results from the use of these presumptions were criticized at the above noted Workplace Liability Conference by speakers Erlenborn, *id.* at 165, 195, Strader, *id.* at 174, and Elisburg, *id.* at 183. These critics persuasively attacked the federal Black Lung Program asserting that the Program's problems and high costs are traceable to excesses in administrative and legislative generosity, rather than to the presumptions themselves. As another speaker stated: "We may not want to replicate Black Lung because it hasn't been a successful system. But the other lesson is that Black Lung was born out of desperation; it was born out of the dissatisfaction with the systems that weren't doing what they were supposed to be doing." *Id.* at 299 (statement of Professor Barth). In another panel at the Workplace Liability Conference, Professor Barth argued for the general use of presumptions. He recommended that they be designed by medical experts with cooperation from labor and business. Comments of Peter Barth, in FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 319-20 (1981). Presumptions administered at the state level should be less prone to excess than federally administered systems because of market forces, *e.g.*, competition for jobs. *See supra* note 17 & accompanying text.

529. The Commission's report was submitted to the President and Congress on July 31, 1972. The Commission also issued two publications: COMPENDIUM ON WORKMEN'S COM-

alignment of benefit and other standards,[530] and that mission should continue. This Commission, or a similar one, should coordinate the occupational disease policies of the tort, welfare, Social Security, and hospitalization insurance systems.[531] Greater uniformity in workers' compensation statutes is necessary for effective coordination with the other social support systems. While federal preemption of workers' compensation may not be a practical way to achieve uniformity, federal encouragement of state efforts to align their policies may be effective.[532]

Although courts must intervene when fundamental rights are abrogated by legislation, the invalidation of statutes rarely solves complex social and economic problems. However the various state courts view the scope of their constitutional mandates, the problems highlighted in this Article are legislative ones that ultimately may require action by the

PENSATION (1973) and SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1973).

530. *See* J. TRIESCHMAN & D. HARDIGREE, WORKERS' COMPENSATION BENEFITS: PAST, PRESENT, AND FUTURE, WORKERS' COMPENSATION: PERSPECTIVE FOR THE EIGHTIES 55-66 (Society of Chartered Property & Casualty Underwriters, Monograph Fall 1981). Eighty-four recommendations were made by the Commission, of which 19 were considered essential. Even so, none of the 50 states have enacted all of the essential recommendations made by the Commission. *Id.* at 56. Nevertheless, "improvements have occurred." Over "1400 amendments relating to workers' compensation were passed between 1972 and 1978." *Id.*

531. In January 1976, the policy group of the Inter-Agency Workers' Compensation Task Force, along with members of several federal agencies, urged the reform of state workers' compensation programs. The group recommended federal monitoring of state progress and federal technical assistance to the states. After submitting its report, the Task Force was merged with the Division of State Compensation Programs, Department of Labor. UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS VII (1984). To influence state legislatures, however, a federal commission needs high level state representatives as well as independent experts.

532. There have been a number of attempts to mandate federal standards for state administered workers' compensation systems. *See, e.g.*, S. 420, 96th Cong., lst Sess. (1979). This bill sought to implement the 19 essential recommendations of the National Commission on State Workmen's Compensation Laws. *See supra* note 530.

In his introductory remarks to this bill, co-sponsor (with Senator Javits) Senator Williams stated:

> The results of this bill will be to shift some of the current costs of industrial accidents and diseases to our workers' compensation system, and away from the social security system, the welfare system, the medicare system, the employer health benefits plan systems, and from the private savings of the victims of industrial accidents and diseases.

National Workers' Compensation Standards Act of 1979, S. 420, 96th Cong., lst Sess. § 420, *reprinted in* WORKMEN'S COMP. L. REP. (CCH) No. 23, at 56 (Feb. 23, 1979).

This proposal, which would give the power to set benefit levels to the federal government, but leaves to states the administrative chores, goes too far. An ongoing national commission should recommend or suggest standards and procedures for the various interested constituencies within the states to use as a focus for lobbying, debate, implementation, and administration at the state level.

United States Congress.[533]

533. In the 1985 legislative session of the Indiana General Assembly, a bill, H.B. 1171, was introduced in the House that would extend the last exposure period for asbestos related diseases from 3 to 20 years. The bill as amended would permit claimants disabled prior to July 1, 1985, to bring claims for compensation until July 1, 1986. Unlike previous bills introduced in the legislature that failed, this bill is cosponsored by the powerful Indiana Manufacturers' Association and various state labor organizations. Indianopolis Star, January 23, 1985, at 8, col. 5. It should be noted, however, that Richard Bunker would have failed to qualify even under this limitation period; 26 years had elapsed between his last exposure to asbestos and the manifestation of his asbestosis. *See supra* notes 29-35 and accompanying text.

Appendix

SUMMARY CHART: STATE OCCUPATIONAL DISEASE ACT TIME LIMITATIONS

State	Prim.Stat. Sec.	Last Exp.	Min. Exp.	Last Emp.	Disc.	Disc.Occ. Rel.	Retro. App.	Eff. Date Lim.	F.N. Ref.
Ala.	25-5-117	X	O		P, R				85-89
Alaska	23.30.105					X			302
Ariz.	23-1061		S			X			302
Ark.	81-1318(2)	X[a]	Pre. re A,S		R				90-105
Cal.	5412					X			302
Colo.	8-52-105				X		no		271-87
Conn.	31-294				X				296-97
Del.	2361					X			302
D.C.	13(a)					X			
Fla.	440.19	Pre.			X				360-61
Ga.	34-9-280(2)	X	Pre. re A,S			R		1946	106-22
Hawaii	386-82				X	Some Dis.[b]			302
Idaho	72-439	X[c]	S[d]	X[c]		R			123-47

Note. The chart indicates the primary type of occupational disease time limitation for each state by an "X" in column 3 (last exposure), 4 (minimum exposure), 5 (last employment), 6 (discovery), or 7 (discovery of occupational relationship). In some states there is an alternative trigger rule, which is indicated by "Alt." in the appropriate column. Presumptions regarding timing limitations are indicated by "Pre.". The presumption runs against the claimant unless otherwise indicated by a footnote. Also indicated on the chart are the primary statutory timing section cite (column 2), whether the statute is retroactively applied (column 8), and last exposure effective date limitations (column 9). Column 10 indicates where the state is discussed in the text by keying to the appropriate textual footnotes. Chart footnotes give additional details regarding that state's classification. Finally, the chart indicates timing exceptions carved out for individual diseases. These diseases are indicated by the following symbols:

A = Asbestos(is)
B = Byssinosis
D = Dust Diseases
Dis. = Disease(s)
H = Hearing Loss
L = Lead Poisoning
O = Occupational Pneumoconiosis
P = Coal Miners' Pneumoconiosis
R = Radiation
S = Silicosis

a. A, S claimants must file within 3 years of last exposure and one year of disablement.

b. Injuries from compressed air, arsenic, A, benzol, beryllium, zirconium, cadmium, chrome, lead, flourine, or other minerals with carcinogenic properties, and R governed by discovery of occupational relationship.

c. Notice must be given (except regarding R, S) within five months after employment ceased and 60 days after first manifestation, and disablement must be within one year (S, four years) of last exposure.

d. There is also a 60-day minimum exposure rule for nonacute diseases.

State	Prim.Stat. Sec.	Last Exp.	Min. Exp.	Last Emp.	Disc.	Disc.Occ. Rel.	Retro. App.	Eff. Date Lim.	F.N. Ref.
Ill.	Ch. 48 172.36(1)(F)	X	Pre.[e]					7-1-51[f]	148-53
Ind.	22-3-7-9(f)	X	Pre.			R		g	29-79
Iowa	85A.12	X	Pre. re O					10-1-47	154-57
Kan.	44.5a01(c)	X[h]	Pre. re S					7-1-53	292 158-65
Ky.	342.316	Alt.	Pre. re P[i]		X				378-79 346
La.	23:1031.1		Pre.		Alt.	X			375-78
Me.	tit.39,S189	X[j]	Pre. re S		X[j]			7-1-41	166-76
Md.	Art.101, S26					X			302
Mass.	41				X				293
Mich.	418.441					X			302
Minn.	176.151(4)					X			311-16
Miss.	71-3-35				X[k]				293
Mo.	287.430		A,H,R,S			X			317-20
Mont.	39-72-403		S	X				7-1-59	290 242-45
Neb.	48-137				X				298-300
Nev.	617.330	D[l]			X[m]		yes	1947	227-37
N.H.	281:17					X		8-31-47	302
N.J.	34:15-34					X[n]	no[n]		321-24
N.M.	52-3-19		A,S		X	R		4-9-45	238-41

e. There is a conclusive presumption that the claimant was exposed if he worked in an occupation or process in which the hazard exists (limited exceptions).

f. Act applies to *diseases* incurred after this date.

g. No liability for *disability* occurring prior to act.

h. One year for disability except R (no limit) and S (three years for death only).

i. Presumption disability or death due to compensable P if exposed for ten years.

j. Must file within two years after disablement and three years after last exposure.

k. For R, date of accident is date of disablement.

l. Minimum exposure required for S; occupational disease of the respiratory tract from exposure to dust defined to be the same as S.

m. Must file within ninety days of knowledge of disability; occupational disease must be contracted within twelve months of disability.

n. 1980 discovery rule not retroactively applied in cases of A, S, and other diseases including those having the same characteristics as these diseases as determined by the National Institute for Occupational Safety & Health.

State	Prim.Stat. Sec.	Last Exp.	Min. Exp.	Last Emp.	Disc.	Disc.Occ. Rel.	Retro. App.	Eff. Date Lim.	F.N. Ref.
N.Y.	18;28;40		Pre. re D[o]	X[p]		Some Dis.[q]			325-42
N.C.	97-58	A,L,S	A,L,S[r]		X	R	yes	3-26-35	177-217
N.D.	65-05-01					X			302
Ohio	4123.85	D,P,S,R[s]	A		Alt.	X			295
Okla.	tit.85 S24;43	Alt.				X		6-6-53	291, 348
Or.	656.807	X[t]			X[t]				365-73
Pa.	411;415		A,P,S	X					246-57
R.I.	28-35-57				Alt.	X			302
S.C.	42-11-70	X	B			R			218-24
S.D.	62-8-11; 13;29		S	X[u]	X[u]	R		7-1-47	293 258-61
Tenn.	50-6-305					X			307-10
Tex.	8307S4(a)		[v]		X		[v]	1947	293
Utah	35-2-13		S	X		R		7-1-41	262-70
Vt.	1006	X				R			
Va.	65.1-52	X[w]				A;Alt.[x]	yes		343-45
Wash.	51.28.055					X			302
W.Va.	23-4-15	Alt.				X	yes		349-59
Wis.	102.12					X[y]			301
Wyo.	27-12-503	X				R;Alt.[z]			346-47

o. Exposure for sixty days to harmful dust within state after September 1, 1935 presumed to be injurious exposure.

p. Unless in same employment as when contracted disease, disability must occur within twelve months of contraction.

q. Compressed air illness, S, D, R, disease from exposure to arsenic, benzol, beryllium, zirconium, cadmium, chrome, lead, flourine.

r. Employee who is removed from industry is limited to payment for 104 weeks; compensation for A complicated by TB reduced by 1/6.

s. Last exposure rule does not apply to disability or death from exposure occurring after January 1, 1976.

t. Claimant must file within five years (ten years, R; forty years, A) of last exposure in employment *and* within 180 days of disability or diagnosis of occupational disease, whichever is later.

u. Must file within two years of disability and give notice within six months of cessation of employment with employee in which disease contracted.

v. If injured before August 30, 1971, old law applies which presumed A and S not due to employment unless minimum exposure.

w. Last exposure rule does not apply to cataracts, some skin cancers, R, ulceration due to chrome compounds or caustic chemical acids or alkalides, undulant fever caused by industrial slaughtering & processing of livestock and handling hides, mesothelioma, and angiosarcoma of the liver due to vinyl chloride exposure.

x. Must file within two years of diagnosis of occupational disease or five years of last exposure—whichever *first* occurs; A, after diagnosis.

y. Benefits due after a twelve-year period paid from supplemental fund.

z. Must file within one year of diagnosis of occupational disease or three years of last exposure—whichever *first* occurs; R, after diagnosis.